

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2008



Leadership is a behavior, not a position

LEGAL UPDATE

2007 CASES FROM:

KENTUCKY COURTS

SIXTH CIRCUIT COURT OF APPEALS

2006-07 U.S. SUPREME COURT TERM



John W. Bizzack, Ph.D.
Commissioner





The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.



DOCJT.KY.GOV

Leadership Branch

J.R. Brown, Branch Manager
859-622-6591

JamesR.Brown@ky.gov

Legal Training Section

Main Number
General E-Mail Address

859-622-3801
docjt.legal@ky.gov

Gerald Ross, Section Supervisor
859-622-2214

Gerald.Ross@ky.gov

Helen Koger, Administrative Specialist
859-622-3801
Anna Hudgins, Office Support Assistant
858-622-3745

Helen.Koger@ky.gov

Anna.Hudgins@ky.gov

Kelley Calk, Staff Attorney
859-622-8551
Thomas Fitzgerald, Staff Attorney
859-622-8550
Shawn Herron, Staff Attorney
859-622-8064
Kevin McBride, Staff Attorney
859-622-8549
Michael Schwendeman, Staff Attorney
859-622-8133

Kelley.Calk@ky.gov

Tom.Fitzgerald@ky.gov

Shawn.Herron@ky.gov

Kevin.McBride@ky.gov

Mike.Schwendeman@ky.gov

NOTE:

General Information concerning the Department of Criminal Justice Training may be found at <http://docjt.ky.gov>. Agency publications may be found at <http://docjt.ky.gov/publications.asp>.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

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While many of these cases involves multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.

Non-published opinions may be included in this update and will be so noted, see below for specific caveats regarding these cases. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates. As such, each update may include cases that were decided earlier, but were held for finality.

All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:

Miranda v. Arizona, 384 U.S. 436 (1966)

Terry v. Ohio, 392 U.S. 1 (1968)

Crawford v. Washington, 541 U.S. 36 (2004)

NOTES REGARDING UNPUBLISHED CASES

FEDERAL CASES:

Unpublished Cases carry a "Fed. Appx." Or Westlaw (WL) only citation.

Sixth Circuit cases that are noted as "Unpublished" or that are published in the "Federal Appendix" carry the following caveat:

Not Recommended For Full--Text Publication

KENTUCKY CASES:

Unpublished Cases carry the Westlaw (WL) citation.

Kentucky cases that are noted as "Unpublished" carry the following caveat:

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

UNPUBLISHED CASES

Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).

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KENTUCKY

PENAL CODE - WANTON ENDANGERMENT

Towe v. Com.

2007 WL 2404506 (Ky. 2007)

FACTS: On May 10, 2005, Towe had been drinking. He went to a farm to pick up some materials, accompanied by his girlfriend, Daniels. They ran into McMillen and Mason, who were drinking beer. The four began to converse, and then to argue. McMillen asked Towe to leave, and Towe did so, but he returned 20 minutes later. He shot McMillen and pointed his gun at Mason, who ran. Towe left, and Mason returned to assist McMillen. When KSP arrived, McMillen was being put into an ambulance but he was able to explain what had occurred. McMillen survived, but "suffered horrendous pain and permanent impairment."

Towe was found after an extensive search; his weapon was located nearby. He was eventually charged and convicted of assault and wanton endangerment, along with tampering with physical evidence. Towe appealed.

ISSUE: Is pointing an apparently loaded weapon at someone sufficient to charge Wanton Endangerment?

HOLDING: Yes

DISCUSSION: Towe challenged the sufficiency of the evidence against him for each of the charges. First, with regards to the tampering charge, Towe argued that his "girlfriend took the gun from him and hid it." However, given the facts, the Court found it "not unreasonable for the jury to conclude that [Towe] shot McMillen with the pistol, ran from the scene, and was later found hiding in a barn." Even if Towe's girlfriend took the gun, "it could be inferred that such was done at his request or with his acquiescence." Next, with regards to Wanton Endangerment, Towe argued that simply pointing the gun at Mason, without verbal threats, was insufficient to prove Wanton Endangerment. The court, however, found that Mason had no reason to doubt, given what had already happened, that the gun was loaded and that McMillen intended to shoot him. Finally, with regards to the Assault charge, the court found that even though the evidence had provided no motive, and even though he claimed self-defense, that the evidence was clear that he intentionally shot McMillen.

Towe's conviction was upheld.

PENAL CODE - ROBBERY

Hobson v. Com.

2007 WL 2343761 (Ky. App. 2007)

FACTS: On July 11, 2005, Hobson tried to buy goods from an Ashland Wal-Mart with a credit card that had been reported stolen. The cashier notified management. Officer Schoch, Ashland PD, was

already at the store for an unrelated matter, and went with the manager to the register. Officer Schoch spoke to Hobson, who "twice attempted to pass himself off as the owner of the credit cards" - even showing the officer an OL that matched the cards. Officer Schoch warned him that it was a "crime to lie to a police officer" and Hobson changed his story, stating that the card owner was his cousin and he had permission to use the card.

Officer Schoch asked if they might call the cousin, and Hobson agreed, accompanying the officer and the manager toward the loss prevention office. (The goods and the card were left at the register.) As they reached the office, however, Hobson fled through the "buggy" door. Officer Schoch chased him, and they scuffled. Officer Schoch suffered a badly broken ankle as a result. With the assistance of security, however, Hobson was apprehended.

Hobson was charged with Robbery in the First Degree and related charges. He was convicted of Robbery and pled guilty to the other charges. He appealed the Robbery conviction.

ISSUE: Does an injury (to an officer or third party) caused during an escape from a Theft convert the case into a Robbery?

HOLDING: Yes

DISCUSSION: Hobson argued that the "brief period between the attempted theft and the injury to Officer School" should have been construed as "two separate events" - effectively a Theft and then an Assault, not a Robbery. The Court, however, agreed with the precedent set in Williams v. Com.¹ In that case, the Court found that the "force used was in the course of committing the theft because it happened during the escape stage" - just as in this case. Hobson then argued that he didn't use force aggressively, with an intent to harm, but the Court, again, found that was an element of Robbery, which only required that force be used.

Hobson's conviction was affirmed.

PENAL CODE - FLEEING AND EVADING

Foley v. Com.
233 S.W.3d 734 (Ky. App. 2007)

FACTS: On April 6, 2005, Officer Thompson (Radcliff PD) spotted Foley "driving erratically." Since Thompson was driving an unmarked car and was not in uniform, he simply followed until Foley "pulled his vehicle over to the side of the road and stopped." Officer Thompson placed a blue light on his dash and put on "some type of police vest," but as he approached Foley's car on foot, Foley "drove away at a high rate of speed." Officer Thompson then pursued Foley, joined in by Officer Skees in a marked unit. They got onto I-65, left Hardin County and entered Bullitt County. Officers from Bullitt County placed stop sticks and were able to get the vehicle stopped. Bullitt County officers arrested Foley and turned him over to the Radcliff officers to be returned to Hardin County.

¹ 639 S.W.2d 786 (Ky. App. 1982).

Foley was charged with a number of traffic offenses, in particular, Fleeing and Evading in both Bullitt and Hardin Counties. Specifically, he pled guilty to second-degree fleeing and evading in Bullitt County, and was indicted in Hardin County for first-degree fleeing and evading, DUI and related charges.

Foley argued that the two fleeing and evading charges constituted double jeopardy, and that both were as a result of a "continuing course of conduct." Hardin County denied the motion to dismiss its charge and Foley was convicted. He then appealed.

ISSUE: Does a continual flight constitute a single act of Fleeing and Evading, even if it crosses into another county?

HOLDING: Yes

DISCUSSION: Foley argued that being convicted in two separate counties, under two charges, of Fleeing and Evading for the same course of conduct, violated the double jeopardy clause. The Court agreed that the statute was "intended to punish a specific act, failing to disobey (sic) a direction given by a police officer."² However, the Court concluded, "regardless of how many police officers may be considered to have given an order to stop," the flight is a "single continuous act." The Court noted that application of this rule to this particular statute (KRS 520.095) is one of first impression, the simple fact was that Foley "drove without interruption from Hardin County into Bullitt County." "His continued disregard constituted a single event without any sufficient break in conduct and time, and thus cannot be parsed into separate and distinct offenses."

Foley's conviction for First Degree Fleeing & Evading in Hardin County was reversed.

Perry v. Com.
2007 WL 290399 (Ky. App. 2007)

FACTS: On Dec. 6, 2004, Deputy Stevens (Pulaski County SO) was patrolling when he spotted Perry "driving in the opposite direction." Deputy Stevens believed Perry's operator's license was suspended, so he attempted a traffic stop. Perry, however, speeded up, and Stevens pursued. When they reached a dead end on the road, "Perry jumped out of his car and ran toward the lake." A passenger in the vehicle, Gregory, "immediately surrendered to Deputy Stevens." Gregory gave the deputy a bag of methamphetamine. Perry was later captured and arrested.

Both men were charged with trafficking, and Perry was further charged with first-degree fleeing and evading and PFO. Perry was acquitted of the trafficking charge, but convicted on the other two charges. Perry appealed.

ISSUE: Is leading an officer on a high-speed chase, on narrow country roads, sufficient to charge with First-Degree Fleeing and Evading?

HOLDING: Yes

² Obviously, the Court meant to say "obey."

DISCUSSION: Perry argued that his actions were not sufficient for the first-degree offense, in that the Commonwealth lacked sufficient evidence that his actions put anyone at “substantial risk of serious physical injury or death.” The deputy had testified that the road in question, Edgewater Road, had a speed limit of 25 miles per hour, and that it was a “narrow country, road, barely two lanes wide, a road that is not safe at high speed.” Perry argued that Stevens’s statements were in conflict with what he had told the Grand Jury, but that information was not placed before the judge at trial.

The appellate court, however, even accepting the statement from Stevens’ grand jury testimony that was later entered into the record, was “not persuaded that there [was] a substantial inconsistency between the deputy’s statements.” Perry also argued that his vehicle (described as sporty) could handle the curving road better than the “cumbersome police cruiser.” Gregory statements also supported that Perry was “flying” and that Gregory was “pretty scared” by Perry’s driving. The Court noted that the jury was well aware that “Gregory may have had an incentive to” bolster his earlier statements as to Perry’s speed, and chose to believe him anyway.

Perry argued that he couldn’t have been attempting to flee, as he drove down a dead-end road, forgetting, apparently, that he tried to flee on foot, and further argued that his conduct put no one at risk. The Court noted that “[n]o evidence was presented that there was any automobile or pedestrian traffic in the road, that the road was populated, that he had disregarded any traffic signals or stop signs, or that he was driving under the influence of drugs or alcohol.” However, the court found that the testimony of the two eyewitnesses sufficient for the jury to find that “Perry’s conduct created a substantial risk of serious physical injury to himself, to his passenger, to Deputy Stevens, or to any drivers or pedestrians who might have come along the roadway.”

Perry’s conviction was affirmed.

***NOTE:** Although not raised as an issue in this case, there is an anomaly in Fleeing & Evading Police (KRS 520.095/.100) that requires that the subject in the first degree be fleeing from a police officer, and in the second degree, to be fleeing from a peace officer. This might become an issue when the officer is not a police officer, but is a peace officer, as deputy sheriffs have been held to be in earlier legal opinions.*

PENAL CODE - ASSAULT/RESISTING ARREST

Simpkins v. Com.

2007 WL 2686785 (Ky. App. 2007)

FACTS: McCracken County (Paducah) officers were called to a “report that Simpkins had violated a DVO and was in the area of the woman’s apartment” that had taken out the DVO. The officers found Simpkins within 500 feet of the apartment” - within the prohibited space. When Simpkins saw the officers, he “began to walk away.” They ordered Simpkins to stop, and he did so, and the officers arrested him. He was handcuffed, but as he was being walked to the cruiser, Simpkins kicked one of the officers. He also “wedged himself against the roof and floor of the [cruiser], refusing to be placed inside” but the officers were finally able to get him into the back seat. He kicked at one of the officers, “striking him in the chest but causing no injury.” The officers warned the jail staff about Simpkins’ actions, and he “then shouted out that he would do it again and went on to say he was going to return and kill the occupant of the apartment.”

Simpkins was charged with violating the DVO, Terroristic Threatening, Assault in the Third Degree and Resisting Arrest, and was convicted on all charges. He then appealed.

ISSUE: May a suspect be charged with both Resisting Arrest and Assault in the Third Degree?

HOLDING: Yes

DISCUSSION: Simpkins argued first that he couldn't be convicted of Assault because he caused no injury to the officer, but the Court quickly pointed out that actual injury isn't required for the Third Degree form of Assault. Next, the Court quickly concluded that his actions "were well within the behavior prohibited" under Resisting Arrest. Simpkins argued that it was double jeopardy, however, to be charged with both, but the Court noted that the "charges did not arise from the same conduct." The Resisting Arrest elements were satisfied "before he was finally placed in the police vehicle" while the "actions which supported the Assault charge, attempting to kick the officer in the face and striking him in the chest, occurred after the officers had succeeded in arresting him and had placed him in the vehicle." The two charges also each "require proof of an element that the other does not."³

The McCracken Circuit Court decision was affirmed.

DUI

Bridgers v. Com.

2007 WL 121846 (Ky. App. 2007)

FACTS: On Oct. 25, 2000, Trooper Crumpton (KSP) saw a vehicle, driven by Bridgers, cross the centerline of Hwy 55 twice, and then cross the fog line twice, near Taylorsville. Trooper Crumpton made a traffic stop. He had Bridgers perform the following field sobriety tests: the one-leg stand, the walk-and-turn, the horizontal gaze nystagmus (HGN) and the preliminary breath test. Bridgers' performance on the FSTs led to Crumpton arresting him for DUI, and following a search, he was further charged with possession of marijuana and drug paraphernalia (a pipe). Bridgers registered a 0.129 on the Intoxilyzer.

Bridgers was convicted of all charges, and appealed.

ISSUE: Must an officer be qualified as an expert to testify as to the results of field sobriety tests?

HOLDING: No

DISCUSSION: Bridgers argued that the field sobriety test evidence "was technical in nature and therefore subject to the trial court's gate-keeping function" as discussed in Daubert v. Merrell Dow Pharmaceuticals.⁴ Bridgers relied upon a Maryland District Court case, which held that FSTs could not be used to "prove a specific blood alcohol content" and that officers could give only "lay opinion testimony" concerning their observations of the performance of the test.

³ Blockburger v. U.S., 284 U.S. 299 (1932); Com. v. Burge, 947 S.W.2d 805 (Ky. 1997).

⁴ 509 U.S. 579 (1993).

The Court noted that the trial court did not require the Commonwealth to prove the “field sobriety testing was scientifically valid,” but did require them to show that the “tests were properly carried out by Trooper Crumpton.” The Court viewed the videotape. Bridgers complained that the walk-and-turn was done incorrectly, because the “ground where Bridgers was required to perform the test was not level” – but the Court “held that Bridgers could address that objection through cross-examination.” (However, it did not come up again, because Crumpton noted that Bridgers actually passed that test.) The Court noted that it had previously held that FSTs are admissible and the officers “may offer both lay and expert testimony that a [subject] was intoxicated.”⁵

Bridgers also complained that although Crumpton testified about the Intoxilyzer and stated that it was working, the Commonwealth did not “offer any evidence concerning the machine’s maintenance records.” At the time of the trial, the Court noted that the case of Wirth v. Com. established the “foundation requirements for the introduction of breath tests results.”⁶ However, the Court had since revisited Wirth and clarified that the Commonwealth could satisfy the requirements “by relying solely on the testimony of the operator so long as the documentary evidence, i.e. the service records of the machine and the test ticket produced at the time of the test, are properly admitted.” In this case, “the service records of the machine were not introduced.” However, the Court found that while this was an error, it was a harmless error “in light of the other testimony indicating Bridgers was intoxicated.”

The Court further noted that breath testing “has been existence for a long time” and while perhaps not flawless, “has sufficient reliability to be admissible.” Requiring detailed testimony as to the science of the test “would only serve to confuse the jury.”

Finally, Bridgers argued that there was no evidence that he was subjected to the breath testing within two hours of the stop, but the Court noted that the videotape showed the “time and date of the stop and arrest” and that the test ticket also marked that time and date.

Bridgers’ conviction was affirmed.

⁵ See Kidd v. Com. 146 S.W.3d 400 (Ky. App. 2004) and Com. v. Rhodes, 949 S.W.2d 621 (Ky. App. 1996).

⁶ 939 S.W.2d 78 (Ky. 1996).

SEARCH AND SEIZURE

SEARCH AND SEIZURE - TERRY

Blair v. Com.

2007 WL 1720133 (Ky. App. 2007)

FACTS: On Jan. 14, 2005, Lexington Metro PD officers were patrolling in a high crime area of town in response to "citizen complaints of loitering and drug activity." Officer Greathouse "observed two persons acting suspiciously" ... and one "walked away when he noticed the officer's patrol car." Officer Greathouse spotted the same two men on a nearby road and called for assistance to observe the pair. Officers Dean and Huddleston arrived to assist, and when one of the subjects got into a car and drove away, they followed. When the officers realized the car had an expired registration plate and that the car failed to signal a turn, they elected to make the traffic stop. However, before they could do so, the vehicle pulled over and the driver got out, leaving the door ajar. The officers, wearing plainclothes but with badges around their necks and ball caps with police insignia, got out and chased the driver. They verbally identified themselves, repeatedly. Officer Huddleston spotted the runner (Blair) drop an item, later found to be a set of digital scales. Finally, Officer Hammond tased Blair and he fell to the ground, sustaining minor injuries. Blair continued to fight, and eventually, was tased a second time. The officers were finally able to take Blair into custody, and he was charged on traffic offenses, driving on a suspended OL and resisting arrest. They found 7.2 grams of cocaine, cash and paraphernalia on Blair's person. He was eventually charged with trafficking and the traffic offenses.

Blair moved for suppression, arguing that the officers had, at best, only reasonable suspicion and that the seizure was unlawful. The trial court overruled the motion. Blair took a conditional guilty plea and appealed.

ISSUE: May independently innocent factors be considered together in making a Terry stop?

HOLDING: Yes

DISCUSSION: Blair argued that "his interaction with the police officers was in violation of the Fourth Amendment," particularly Terry. In addition, because Blair also "alleged the use of excessive force in effectuating his search and seizure," the Court looked to the "'reasonableness' standard elucidated in Graham v. Connor⁷."

The Court noted that much of the incident was not in dispute, and focused only upon the issues that were. Blair argued that he was unclear of the identity of the individuals chasing him, and argued that he did not know they were officers. However, the Court concluded the trial court had taken all of the testimony into account, and declined to disturb its decision regarding that issue.

Next, the Court discussed whether the officers had sufficient reasonable suspicion to take action. The Court detailed the observations made by the two officers noting that "[w]hen taken individually, and in isolation from the totality of the evidence, many of these factors could be characterized as being indicative

⁷ 490 U.S. 386 (1989).

of innocent conduct.” However, under U.S. v. Arvizu, the Court had held that officers were permitted “to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.”⁸ The Court found that “the totality of the evidence in the case sub judice clearly indicates the officers did, in fact, have a particularized and objective basis for suspecting [Blair] was engaged in criminal activity” and thus the original stop was justified.

With regards to the struggle, the Court noted that although Blair stated he was offering only passive resistance to his arrest, that the Court could “find no way of how wrestling oneself from the firm grasp of a police officer can be termed as ‘passive resistance’ or ‘simple nonsubmission.’” In addition, his “continued flight down a darkened street toward a heavily traveled roadway created an escalating risk of physical injury to himself, the pursuing officers, and any motorist or bystander who happened along his path.” That would also have justified the officers’ belief that Blair would not respond to a citation, necessitating a custodial arrest. Once he was arrested, a search incident to arrest was justified.

Finally, the Court looked to the use of force, with Blair arguing that tasers should be eliminated as deadly weapons. In a footnote, however, the Court noted that there is “no controlling, nor even persuasive, authority to support this proposition” and that “[n]o published cases from Kentucky state courts mention the word ‘taser’, and the few Sixth Circuit federal cases in which the term is referenced are civil suits filed by prisoners concerning allegations of civil rights violations.” Although Blair argued that he posed no threat, the Court noted that “[a]n officer involved in the day-to-day service of protecting the public must always be mindful of the possibility that a suspect is armed and dangerous, along with the many other inherent dangers involved in law enforcement.” Blair further argued that he did not “flee” from the officers, but that he was “unaware of the officers’ true identities and because they allegedly did not properly convey their intentions in ordering him to stop, he argues that his act of running was entirely proper under the circumstances.” Even if he failed to comprehend that they were, in fact, officers, that failure might be “best ... explained by [Blair’s] decision to run from the officer immediately upon exiting his vehicle.” Blair “evidenced that he was actively resisting being arrested when he wrenched himself from the grip of Officer Huddleston.”

The Court found that the “officers wisely utilized their training and the professional tools provided to them when presented with this tense situation that [Blair], himself, created.” The Court found no indication that any jurisdiction classifies tasers as deadly weapons, “nor that their use should be discontinued.” The Court concluded that the “force employed was reasonably proportionate to the difficult, tense, and uncertain situation Officer Huddleston and Officer Hammond faced and did not constitute excessive force” even if it was “an unpleasant experience.”

The Fayette Circuit Court decision was affirmed.

Com. v. Scalf
2007 WL 625357 (Ky. App. 2007)

FACTS: On the day in question, Scalf was “stopped as he walked down a Covington city street in an area known to be a ‘high drug area’” Officer Mears later testified that “he and another officer were standing on the sidewalk watching a car being towed when Scalf approached on foot.” He and Scalf

⁸ 534 U.S. 266 (2002).

"engaged ...in conversation." Mears asked Scalf where he was going, and Scalf replied that he was going to a friend's house, but he could not give a name or address, other than Alex and a general direction. "Officer Mears stated that because Scalf appeared to be 'tap dancing around answers,' he became suspicious and asked him if he 'had anything on him' and for permission to search him." Scalf consented, and Mears found heroin in Scalf's back pocket. Scalf, of course, stated that "the officers jumped out of a squad car and started searching him without engaging him in conversation or asking for consent."

The trial court agreed that Scalf's detention was a seizure and that the "officers were unable to demonstrate 'specific and articulable facts which gave rise to reasonable suspicion' justifying the detention." The Court noted that the officers "were aware that [Scalf] had no outstanding warrants and continued their interrogation" beyond the point the court considered reasonable. The trial court found that it was reasonable that Scalf believed he was not free to go, and suppressed the evidence.

The Commonwealth appealed.

ISSUE: Are officers permitted to approach someone in public and ask questions?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that officers are free to "approach anyone in public, engage them in conversation, ask a limited number of routine questions followed by a question about possession of contraband and a request to search." The Court noted that the trial court apparently accepted "Mears' version of the events," rather than Scalf's, but provided no reasons as to why it believed that a reasonable person in his position would not have felt free to end the encounter and leave. The Court looked to Bostick⁹ for guidance, and concluded that a "seizure does not occur simply because a police officer approaches an individual and asks a few questions."

The Court concluded that the original encounter did not constitute a seizure and remanded the case back to the trial court for further proceedings.

Shields v. Com.
2007 WL 866464 (Ky. App. 2007)

FACTS: On Aug. 31, 2004, Officer Sutherland (Owingsville PD) noticed a broken window at a local business. He called for backup and did a "quick check of the building." Officer Everman arrived, and together, they "determined the office had been burglarized." Officer Sutherland drove around the area seeking suspects, and "spotted a car backing out of the parking lot at a doctor's office." The car did not immediately turn on its headlights. Officer Sutherland did not recognize the car, and when he pulled up behind it, he discovered "the license plate partially obscured by mud." He initiated a traffic stop.

When Sutherland approached, he found Browning in the driver's seat and Shields in the passenger seat. Both stated they had gone to the parking lot to have sex. "At that point, Officer Everman arrived at the traffic stop, and he asked Shields to step to the rear of the car for a field interview." There, "Everman noticed Shields's shoes were covered with mud and grass." He frisked Shields "for safety and proceeded to pull \$291.00 in cash from Shields's left pants pocket." Upon being asked, Shields pulled out more cash

⁹ Florida v. Bostick, 501 U.S. 429 (1991); see also Florida v. Royer, 460 U.S. 491 (1983), U.S. v. Drayton, 536 U.S. 194 (2002)

and checks from his other pocket. The couple was taken to the office for more questioning, and eventually, they were both arrested.

It was learned, during the investigation, that one of the checks was written to the business next to the one that initially found to have been burglarized. After Shields was arrested, the officers learned that business had also been burglarized. Shields was charged with burglary and PFO, and he moved to suppress the evidence found during the frisk. The trial court ruled "that the officers had reasonable suspicion to initiate the traffic stop and complete a protective pat down of Shields for the officers' safety." Eventually, Shields was convicted, and he appealed.

ISSUE: Is time of night a factor that might justify a pat-down?

HOLDING: Yes

DISCUSSION: Shields argued that the initial traffic stop was unlawful, and further, that the pat down went beyond the scope of what could be done during such a stop. The Court first addressed the traffic stop, and found that at the least, Browning was violating Kentucky law by having a partially obscured license plate. That alone justified the stop. With regards to the pat down, the Court noted that while it "recognize[d] the delicate balance of governmental intrusion versus private interest in any search and seizure case, [it is] keenly aware of the dangers facing police officers during an investigatory stop." The officers were alone on the street in the early morning hours, preparing to do a "face-to-face interview at close range." The Court found that sufficient to justify the pat down. Finally, the Court looked at the seizure of the cash, which Shields argued was "not justified by the plain feel doctrine." The Court stated the "Officer Everman instinctively and instantaneously removed the lump from Shields's pocket as a matter of protecting the officers' safety."

The decision of the Bath Circuit Court was affirmed.

Sallee v. Com.
2007 WL 1229405 (Ky. App. 2007)

FACTS: On Nov. 10, 2004, at 1:08 a.m., Officer Gentry (Shelbyville PD) spotted a car "backed into a parking lot." He saw two individuals who appeared to be slumping down and trying to be out of sight. Gentry entered the lot and shone lights on the car, but by that time, the second occupant had left. The driver, Sallee, was out of the car and walking away. Sallee indicated the passenger had "gone into a nearby residence."

Sgt. Lewis, responding as back-up, knocked on the back door of the home, and the occupant denied knowing Sallee. She first claimed to have no ID, but when pressed, produced an operator's license, and retrieved the insurance and registration from the car. She remained near the passenger side.

Gentry became suspicious and asked her to move away from the car. He "searched the passenger side for weapons." He spotted a bulge under the floor mat - lifting it, he found a baggie of cocaine. Sallee was arrested and Gentry searched her car further, finding additional contraband. Marijuana was found on her person at the jail.

Sallee was arrested on numerous drug related charged and took a conditional guilty plea. She then appealed.

ISSUE: May a vehicle be frisked prior to the occupants being frisked?

HOLDING: Yes

DISCUSSION: First, the Court agreed that the original stop was valid under Terry, as Gentry had sufficient reasonable suspicion that Sallee was involved in some illegal activity. Next, Sallee argued that because Gentry did not frisk her first, before investigating the bulge under the floor mat, that he “did not feel sufficiently threatened” as to justify the search of the car. The Court noted, however, that “Sallee was standing next to an open vehicle” - an area under her direct control. The Court looked to Dockstader v. Com.¹⁰ and found that the search that revealed the cocaine was “constitutionally permissible.”

Sallee’s plea was upheld.

Patterson v. Com.
2007 WL 541923 (Ky. 2007)

FACTS: At about 1 a.m., on Sept. 11, 2003, Detective Gosney (Louisville Metro PD) noticed Patterson outside a bar on Frankfort Ave. Patterson was trying to enter the bar, which “appeared to be closed at the time.” Detective Gosney followed Patterson as he walked away with another man. The two men “split up in an alley” and Detective Gosney continued to follow Patterson. At one point, he lost sight of Patterson, but he stayed in the area.

About 20 minutes later, a burglar alarm was activated at a nearby business. When Gosney responded, with other officers, they found a “broken window, blood and a shoe print.” Gosney resumed his search for Patterson.

Approximately 20-30 minutes later, Gosney stopped to refuel his vehicle. While doing so, he spotted Patterson, who went behind a Rally’s and then reappeared a few minutes later. Gosney confronted him at the door to the gas station and identified himself as an officer. Gosney asked where Patterson had been, but got no answer, and he noticed fresh cuts on Patterson’s right arm and forehead. Gosney summoned officers at the scene of the burglary and confirmed that blood had been found, and that the pattern of Patterson’s shoe print was similar to the prints found at the scene.

Detective Gosney “handcuffed Patterson and performed a pat down search.” He found bulges in Patterson’s pockets which “sounded metallic and asked him about the contents. Patterson “suggested that the detective remove the items.” From the pockets, Gosney withdrew “eight watches, one watchband, one bracelet and one coin pendant” – and he immediately arrested Patterson.

While Patterson was taken to the police station, Gosney and Officer Scott searched the area behind the Rally’s and found a zippered case contained a pistol in the bushes.

¹⁰ 802 S.W.2d 149 (Ky. App. 1991).

Detective Horn photographed and then released Patterson, believing that he was not under arrest. He hoped, however, to “obtain more evidence” that might connect Patterson with the burglary. At about 10 a.m., a burglary was discovered to have occurred at a nearby business, and it was learned that the items stolen included several watches and a .25 caliber pistol in a suede case. The owner identified the items retrieved from Patterson as items that were stolen.

On Sept. 15, Detectives Horn and Walker arrested Patterson for Third-Degree Burglary (the first burglary) and First-Degree Burglary, on the second location. He was subsequently released on bond.

On Oct. 21, another business in the area was burglarized, and a small amount of cash and a jacket were taken. Detective Walker identified the burglar, from the videotape, as Patterson. They tried to locate him, and left a card asking him to contact them. Patterson did so, but did not appear as he agreed to do. He was arrested, again, on Oct. 29, pursuant to a warrant.

Eventually, he was convicted on the burglary charges, and took a conditional guilty plea on a charge of possession of a firearm by a convicted felon. Patterson appealed.

ISSUE: Is suspicious, but not obviously illegal, behavior, late at night, sufficient to perform a frisk?

HOLDING: Yes

DISCUSSION: Patterson argued that Detective Gosney “lacked the sufficient ‘reasonable suspicion’ to perform a pat down for weapons.” The Court quickly agreed, however, that given what Detective Gosney knew, “he could reasonably suspect Patterson of being armed” – thus justifying the frisk. Further, when he detected the bulge, “Patterson actually invited him to reach in and take out what was in his pockets.” Thus, the Court agreed, he gave consent for the search of his pockets.

After disposing of other issues, the Court upheld Patterson’s conviction.

SEARCH AND SEIZURE - EXIGENT ENTRY

Causey v. Com.

2007 WL 1196587 (Ky. App. 2007)

FACTS: On Nov. 11, 2005, the Lexington Fire Department responded to a fire at Causey’s sister’s home. (Causey shared the residence.) A firefighter “was instructed by the Incident Commander to search the second floor for human life and for extension of the fire.” This search was “in accordance with standard firefighting protocol.” Two firefighters opened a closet door and found 66 marijuana plants under a plastic sheet. They reported what they had found to the IC who then reported it to Lexington police. Officer Bastian seized the plants and subsequently, Causey was arrested.

Causey requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May contraband found during a search by firefighters be used to support an arrest?

HOLDING: Yes

DISCUSSION: The Court looked to Hazelwood v. Com.¹¹, in which the Court had “addressed a similar situation and found a warrant to be unnecessary.” In that case, the Court stated that :

... the entry and seizure by police must be strictly limited and enumerated several factors that must be satisfied in order for a warrantless seizure to be permissible in these circumstances: (1) the firefighters must be legitimately on the premises; (2) the discovery of the evidence must be inadvertent; (3) the police must enter only at the request of the firefighter; (4) the seizure must be limited to evidence in plain view and be inadvertently discovered by the firefighter; (5) no further search and seizure is performed; and (6) the search and seizure is accomplished within a reasonable time.

Causey further argued that the plants were not in plain view to the firefighters, but the Court quickly agreed that a “thorough search of the entirety of the closet was a legitimate firefighting function.” They were not searching for contraband, but it was appropriate for the firefighters to take action on contraband they found.

The Fayette Circuit Court decision was affirmed and the plea upheld.

SEARCH & SEIZURE - CARROLL

Morton v. Com.

232 S.W.3d 566 (Ky. App. 2007)

FACTS: On the day in question, Morton was driving in Maysville. Officer Hord was behind him. Morton made a turn without signaling and then, approximately a mile later, was seen weaving from side-to-side. Hord made a traffic stop. Hord requested Morton’s documents but Morton was unable to produce the proof of insurance required. Hord called in via radio to check Morton’s OL status, and while waiting, permitted his drug dog to sniff the exterior. The dog alerted on the trunk and the driver’s side door.

Hord told Morton that the dog had alerted on the car and asked for consent to search. Morton refused. Hord then had Morton step out and he conducted what “Hord characterized as a pat down search.” During that search, Horton located an item, which was discovered to be a folded bill containing crack cocaine. Morton was arrested.

Once he was indicted, Morton moved for suppression, which was denied. Morton took a conditional guilty plea, and appealed.

ISSUE: May a driver be searched pursuant to a positive drug dog alert on the vehicle?

HOLDING: Yes

DISCUSSION: Morton argued that the search of his person was unlawful “because it was unsupported by reasonable suspicion of a weapon nor justified as a search pursuant to the automobile exception.” Morton “readily concede[d] that probable cause existed to search his vehicle because of the drug dog’s alerts,” but

¹¹ 8 S.W.3d 886 (Ky. App. 1999).

claimed that the “search of his person was not authorized under the automobile exception as a result of his mere presence within the vehicle.”

The Court concluded that its “precedents permit[ted] such a search under the facts of this case.” The Court equated the case to Dunn v. Com.¹² in which it held that the “strong smell of marijuana emanating from Dunn’s vehicle provided probable cause to search the vehicle, all items contained therein, and the vehicle’s occupants.” The Court noted, in particular, that “Morton was the driver and lone occupant of the vehicle.” As such, the Court concluded “that a positive canine alert, signifying the presence of drugs inside a vehicle, provides law enforcement with the authority to search the driver for drugs but does not permit the search of the vehicle’s passengers for drugs unless law enforcement can articulate an independent showing of probable cause as to each passenger searched.”

Hord also argued that the frisk should have been “strictly limited to uncovering objects that can reasonably be believed to be weapons.”¹³ The Court agreed that “Hord’s subjective justification for seizing the drug evidence does not pass constitutional muster,” the Court found that the officer did, in fact, have probable cause to search Morton for drugs because of the dog’s alert of his vehicle.

The Mason Circuit Court’s decision is affirmed.

Young v. Com.
2007 WL 1519523 (Ky. App. 2007)

FACTS: On Jan 25, 2006, Officer Harvey (Greenville PD) stopped Young for failing to signal a turn. He was the driver in a vehicle occupied by three other individuals. When Harvey approached, he immediately smelled anhydrous ammonia and he learned that the driver (Young) had a suspended operator’s license. Believing Young was intoxicated, Officer Harvey subjected Young to a field sobriety test, which he failed. Young was arrested for DUI and searched.

The officers then searched the vehicle, finding evidence of methamphetamine manufacture. One of the passengers was arrested for possession of drug paraphernalia, for a syringe found in his vicinity. While the officers were searching the vehicle, the Sheriff noted that the arrested passenger (also named Young) was moving around in the back of the cruiser where he’d been secured, and they found Sudafed pills scattered around.

Not having found the source of the anhydrous odor, one of the officers went to get a search warrant for the car. When the warrant was executed, they found additional items related to methamphetamine manufacturing. The passenger later admitted to their involvement in making meth.

Young (the driver) took a conditional guilty plea, and appealed.

ISSUE: Is the odor of anhydrous ammonia sufficient to constitute probable cause for a Carroll search?

HOLDING: Yes

¹² 199 S.W.3d 775 (Ky. App. 2006).

¹³ Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003).

DISCUSSION: Young argued that the search of the passenger compartment was unlawful. Apparently the trial court had justified it under the automobile exception (a Carroll search). The court quickly agreed that Harvey's detection of the anhydrous odor was sufficient evidence to permit the search. The Court quickly discounted Young's assertion that exigent circumstances were needed for such a search.¹⁴ The Court had agreed, in the alternative, that the search was justified as incident to Young's arrest and again, since at least one of the occupants was arrested, the search was also justified under that theory.

The conviction was affirmed.

SEARCH & SEIZURE - PLAIN VIEW

Hallum v. Com.
219 S.W.3d 216 (Ky. App. 2007)

FACTS: On Jan. 27, 2004, as a result of a specific complaint, Finnerty, a CPS investigator, requested help from the Hopkins County SO to go to the Hallum's home. In particular, the tip stated that the Hallums were involved in methamphetamine and marijuana.

Upon arrival, Finnerty and the deputies were admitted and eventually gained entry to a room where Finnerty spotted items she knew indicated methamphetamine manufacture. She pointed the items out to Deputy Bean, who was with her in the room for her safety, and he then took over. Deputies Bean and Troutman stayed at the house while Deputy Crick went to get a search warrant.

When Crick returned and the warrant was executed, the deputies found numerous items indicating methamphetamine manufacturing. Eventually, "Finnerty unsubstantiated most of the referral because the children were supervised and they did not appear to be hungry." She noted that the problems with the house, which included an illegal electrical hookup, could have been remedied without the children being removed from the household.

Hallum was arrested, and indicted. He moved to suppress the evidence on the grounds that the "evidence was not seized pursuant to a valid search warrant," as it was discovered prior to the issuance of the search warrant. The trial court found that the deputies were there for a valid reason, and were invited in, and denied the motion to suppress.

A side issue that arose during the trial was that the home was incorrectly identified by address on the warrant. However, the deputies conferred with the Commonwealth's attorney prior to the seizure of any evidence, and were told that because the GPS coordinates were correctly noted on the warrant, as well as an accurate description, that the warrant was valid. Hallum did not raise the issue on appeal.

Hallum was convicted on various charges relating to the methamphetamine, and appealed.

ISSUE: May officers accompany a social worker on a site visit, and take action based upon evidence found in plain view?

¹⁴ Adams v. Com., 931 S.W.2d 465 (Ky.App. 1996).

HOLDING: Yes

DISCUSSION: The Court noted that pursuant to Kentucky law, Finnerty was obligated to investigate the complaint she received. She properly reported the matter to the local officers. She asked for, and received, consent for the party to enter when they arrived. When Finnerty indicated that she needed to look through the entire house, Hallum did not object, but permitted her to enter the room where the lab materials were held. Hallum did not refuse to allow the deputy to accompany her. In fact, the deputy did not seize anything while in the room, but properly waited until he got a search warrant. In addition, additional evidence found in the kitchen was also admissible, as it was found when Deputy Bean went to that room get a drink for one of the children. (He spotted a "corner bag" - which the Court found to be "immediately apparent" as contraband.)

The Hopkins Circuit Court's decision was upheld.

Fried v. Com.

2007 WL 4292112 (Ky. App. 2007)

FACTS: On November 14, 2005, Detectives Smoot and Hart, along with Sgt. Ensminger (Lexington-Fayette PD) went to Fried's home. The officers had received a tip that drug trafficking was occurring and that "there was heavy traffic to and from the residence and that people would only stay for short periods of time." The officers did a "knock and talk" and at some point, they entered, told Fried why they were there and asked for consent to search. Fried stated he would have to call his father, who apparently owned the house. The Court noted that "during this time, the officers and [Fried] remained in the foyer area and did not venture further into the house."

Fried called his father, who told Smoot, by phone "not to search the house and to wait until he arrived." Hart, however, spotted a marijuana stem on a table, pointed it out to the other officers and "proceeded to retrieve the stem." The officers then "secured the scene until a search warrant was obtained."

Fried was charged, indicted and took a conditional guilty plea following an unsuccessful suppression motion. Fried then appealed.

ISSUE: May the sighting of a marijuana stem be sufficient probable cause for a search warrant?

HOLDING: Yes

DISCUSSION: The Court quickly dispensed with the argument that Fried did not consent to the entry and there was "insufficient evidence that the marijuana stem was in plain view." Finding that the issued "boiled down to one person's word against another's - the Court chose to defer to the trial court in its decision to believe the officers over Fried, as the judge "was in the best position to decide whose testimony was more reliable and credible."

With regard to the actual warrant, Fried "claim[ed] that the stem was so far away from the foyer of the house that its incriminating nature was not immediately determinable and that the seizure of the stem was unlawful." The Court, however, noted that the officers were "initially invited in and the stem was in plain view" from the foyer (although not in the foyer itself), that the "stem could be used as probable cause for a

warrant.” The trial court had found that the first two elements of plain view had been satisfied - that the officers were lawfully in a position to see the item, and that they immediately recognized the item as contraband. The Court did agree with Fried that the actual seizure was unlawful, because the officers did not have consent to enter the room where the stem was located (apparently the living room). However, since the stem was not used to obtain the search warrant, but instead, the officers only used their observation of the stem, which was “legally made.” The Court acknowledged that Detective Hart’s “years of experience with drugs and marijuana in particular” was enough to support his assertion that he recognized the stem as contraband.

To sum, the court stated:

If the stem was unlawfully seized, it could have been suppressed at trial; however, the viewing of the stem was done properly and could be used as support for the search warrant.

The Court found the warrant to be valid and all evidence collected as a result to have been legally obtained. Fried’s plea was affirmed.

Perkins v. Com.

237 S.W.3d 215 (Ky. App. 2007)

FACTS: On Feb. 16, 2004, KSP “received an anonymous call from a woman who alleged that Perkins had stashed a large amount of cocaine, marijuana, and pills under his bed in the back bedroom of his house.” The caller also claimed to have been at the house and “seen him cutting a block of cocaine on a coffee table in the living room.” KSP had received complaints about Perkins before.

At about 8:30 that evening, Troopers Miller, Sims and Banks went to “conduct a ‘knock and talk’ visit.” Malcolm Perkins, 15 or 16 years old, answered the door, and indicated to the troopers that his father was in his bedroom. They asked if he minded if they spoke to Perkins, and Malcolm “invited the officers to enter and then directed them towards Perkins’s bedroom.” The door to the bedroom was open and Perkins was “sitting on his bed eating a sandwich.”

Trooper Miller introduced himself and explained the reason for the visit. Perkins said that he no longer sold drugs, and upon being told that he wouldn’t be arrested immediately if he was honest with the trooper. Perkins gave them some cocaine that was in his pocket; he indicated that it was only for personal use. Perkins gave consent to search the house, and opened a safe that contained over \$9,000 in cash, cocaine, pills and a set of scales. The troopers did not continue the search and left, as promised.

Perkins was duly indicted on Possession of a Controlled Substance and related charges. A few days later, the Grand Jury issued a superseding indictment on Trafficking, instead. He moved for suppression, and was denied. He was eventually convicted on Possession of a Controlled Substances and related charges, and appealed.

ISSUE: May a 15 year old give consent for entry?

HOLDING: Yes

DISCUSSION: Perkins argued that the evidence from the “knock and talk” should have been suppressed, because it was based upon the initial consent of his juvenile son. The Court, however, found that “Malcolm had the apparent authority to consent to their entry into the residence.” The Court, however, found that the troopers had sufficient good faith to accept that Malcolm had the authority to admit them to the house.¹⁵

Next, Perkins argued that “knock and talks” were unlawful. But, the Court noted, “[m]any courts - including ... [the] federal Sixth Circuit - have recognized the legitimacy of ‘knock-and-talk’ encounters at the home of a suspect or another person who is believed to possess information about an investigation.” In addition, the troopers “made no effort to coerce or to deceive Malcolm into granting them entry.” Perkins, further, did not object to their presence or revoke the consent given by his son.

Perkins also argued that since the troopers knew they were looking for drugs, they should have gotten a warrant. The Court noted that since they were working simply from a tip, that the “probable cause was not so clearly established as to preclude the reasonableness of a ‘knock-and search’ visit.”¹⁶

Perkins’ conviction was affirmed.

SEARCH & SEIZURE - PLAIN SMELL

Bishop v. Com.

237 S.W.3d 567 (Ky. App. 2007)

FACTS: On Jan. 4, 1996, Officer Reed (Berea PD) “received information from Anthony Kelley that Bishop had stolen a license plate from a vehicle belonging to Kelley’s mother.” Kelley also reported that “Bishop might be involved in the manufacture of methamphetamine at an undisclosed location.” Reed discussed the matter with other officers and they all three went to where Bishop’s car was located.

At about 3:30 a.m., the officers arrived at the apartment complex. They found the suspect vehicle and checked, and confirmed that the plate on that vehicle actually belonged on a vehicle registered to Kelley’s mother. Officer Puckett noticed that the trunk lid on the car was open a few inches. They went to the apartment occupied by Bishop’s girlfriend, Stamper, and asked about the car, advising her “that they were investigating some vandalism.” Bishop came out in response to their inquiry, and they arrested him. Officer Puckett returned to the suspect vehicle, and “noticed a strong chemical smell coming from the open trunk and suspected a methamphetamine lab.” He lifted the trunk lid and confirmed that the two jars, inside, “were being used to produce methamphetamine.”

Bishop was charged with manufacturing methamphetamine and theft of the plate. He argued for suppression, but was denied. He took a conditional guilty plea and appealed.

ISSUE: Might plain smell justify an exigent search?

¹⁵ The Court looked to other state’s opinions in reaching the conclusion that “a high-school-aged child may be presumed to have at least some authority to allow entry into a home.”

¹⁶ The Court distinguishes the facts of the instant case from the case submitted by Perkins - U.S. v. Chambers, 395 F.3d 563 (6th Cir. 2005).

HOLDING: Yes

DISCUSSION: Although the Court agreed that, as a general rule, warrantless searches are unreasonable, it noted that Kentucky had followed other courts in recognizing the “plain smell” doctrine as an offshoot of the “plain view” doctrine.¹⁷ Further, the Court recognized as exception when there is a “risk of danger to police or others.”¹⁸ The Court agreed that the officers had “legitimate concern for public safety since methamphetamine production, an inherently dangerous act, was occurring in a public place.” Bishop, however, argued that since the officers had at least a suggestion that he might be involved in doing so, they had an obligation to seek a warrant. The Court, however, disagreed, and quickly upheld the trial court’s decision.

SEARCH & SEIZURE - ARREST

Brooks v. Com.
2007 WL 2687400 (Ky. App. 2007)

FACTS: Officer Florence (Lexington PD) was patrolling when he noticed Brooks and another individual standing at an intersection in a high-crime area. Officer Florence pulled up, got out of his car and asked the two men their names and where they lived. Both produced ID and stated that they lived nearby.

Officer Florence believed one of the men, Brooks, was “intoxicated because he was slurring his words and had bloodshot, watery eyes.” Officer Florence examined Brooks’ hands, with his consent, and noted “distinctive burn marks on Brooks’s thumb and index finger.” Brooks admitted that he’d smoked cocaine about an hour before. At that point, Officer Florence told Brooks that while “he was not under arrest at the time” ... he (Florence) “had charges and ... [he] would be detained if he attempted to leave.” He continued checking and discovered that Brooks had an outstanding warrant. Brooks tried to run, but Officer Florence quickly apprehended and arrested him.

Officer Florence found no contraband during a search incident to the arrest, but while taking him to jail, saw Brooks moving around quite a bit. When they arrived at the jail, Florence searched the back seat and found a small baggie of crack cocaine. Brooks was eventually indicted on a variety of charges.

Brooks requested suppression, which was denied. He took a conditional guilty plea, and appealed.

ISSUE: Is an outstanding warrant enough to make a seizure lawful in retrospect?

HOLDING: Yes

DISCUSSION: Brooks argued that the original detention was not sufficiently supported by reasonable suspicion, and that “Florence then proceeded to unlawfully interrogate him without a Miranda warning.” The Commonwealth, however, argued that “the discovery of the outstanding warrant for Brooks’s arrest

¹⁷ Cooper v. Com., 577 S.W.2d 34, 36 (Ky.App. 1979) (overruled on other grounds by Mash v. Com., 769 S.W.2d 42, 44 (Ky. 1989)).

¹⁸ U.S. v. Atchley, 474 F.3d 840, 850 (6th Cir. 2007). See Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

was an intervening circumstances that cured any possible earlier taint resulting from Florence's conduct." The Court cited to Birch v. Com. for the proposition that "[t]he outstanding arrest warrant was an independent, untainted ground for the arrest."¹⁹

Brooks' conviction was affirmed.

SEARCH & SEIZURE - INCIDENT TO ARREST

Fain v. Com.

2007 WL 2743430 (Ky. App. 2007)

FACTS: On July 13, 2005, Fain was parked outside a Shell station in Lexington. Officer Pearson (Lexington-Fayette PD) pulled in and noticed the car, and "immediately became suspicious of the vehicle's location due to the recent number of convenient [sic] store robberies throughout Fayette County." Pearson ran the plate and discovered that the owner (Fain) had an arrest warrant. He called for backup, and Officer Seabolt arrived to assist. Fain was arrested.

Officer Pearson began to search the car while Officer Seabolt took Fain to jail. During that search, Officer Pearson found a "driver's license with his photograph that listed a name other than Fain's." At Pearson's request, Seabolt returned Fain to the scene and gave Fain his Miranda rights. Fain was "asked whether he wanted to talk about the fraudulent driver's license, to which he stated that he did not." Continuing the search, the officers found "three more fraudulent driver's license as well as forged checks."

Fain was charged with Criminal Possession of a Forged Instrument. He requested suppression, and was denied. Fain took a conditional guilty plea to some of the charges. He then appealed.

ISSUE: Is a search incident to arrest of a vehicle justified following an arrest for non-payment of fines?

HOLDING: Yes

DISCUSSION: Fain argued "there was no justification for Officer Pearson to search his vehicle after he was arrested pursuant to a warrant for the nonpayment of fines" - contending that "the arrest was not for an offense justifying a search of his automobile." The Court noted, however, that "one well-recognized exception to the warrant requirement is a search incident to an arrest, which the trial court relied upon when overruling Fain's motion to suppress." The Court noted that, in New York v. Belton²⁰, the Supreme Court had "established a 'bright-line' rule permitting the search of an automobile incident to the arrest of an occupant for the purpose of establishing clear guidelines for police officers to follow in the performance of their duties."²¹

¹⁹ 203 S.W.3d 156 (Ky. App. 2006).

²⁰ 453 U.S. 454 (1981).

²¹ The Belton rule "was adopted by the Kentucky Supreme Court and remains the law applied to searches of automobiles incident to an occupant's arrest." Com. v. Ramsey, 744 S.W.2d 418 (Ky. 1988).

Fain argued that the ruling in Clark v. Com.²² made such searches invalid when for “minor traffic violations” that do not normally result in an arrest, and asked that the Court equate this to his arrest for nonpayment of fines. (Clark has since effectively been overturned.)

The Court, however, noted that, in this situation, “Officer Pearson had a duty to arrest [Fain] once he determined the warrant was valid” and that “[i]t was not up to his personal discretion whether to arrest Fain.” The Court quickly dismissed Fain’s argument and found the search to be valid.

Fain further argued that “once he was placed in Officer Seabolt’s police cruiser, he was no longer a threat to the safety of the officers or the public” and that made the search invalid. Again, the Court dismissed the argument that the “search was not contemporaneous because it was not conducted until he was being transported to jail.”

The denial of Fain’s motion to suppress was upheld.

SEARCH & SEIZURE – TIPS

Howes v. Com.

2007 WL 625276 (Ky. App. 2007)

FACTS: On the day in question, an officer in Magoffin County received a tip that Howes, an employee of a local business, had in her possession controlled substances that she had stolen from that place of business (a home health care facility). The tipster described Howes’ vehicle and plate number. The officer made an investigatory vehicle stop, and eventually, Howes was arrested and took a conditional guilty plea. Howes appealed.

ISSUE: May a tip from an anonymous (but identifiable) informant be considered reliable?

HOLDING: Yes

DISCUSSION: The Court noted that the “tipster in this case was an identifiable citizen informant” – although he did not provide his name he did give his place of employment and “basis of knowledge of the crime.” The call was made to the officer’s cell phone, which provided a further way to identify the tipster. The Court further noted that the “tipster was simply a concerned citizen, not a paid police informant.” The court looked to Com. v. Kelly, for guidance, and agreed that “tips from identifiable citizen informers regarding contemporaneously observed criminal acts constitute a sufficient basis for a peace officer to conduct an investigative stop of the identified suspect.” Although Howes attempted to characterize the tip as anonymous, the Court noted that “the tip had inherent indicia of reliability, as the tipster would have known that he could be held accountable for making any false criminal allegations.”

The Court upheld the stop and the denial of the suppression motion. Howes’ conviction was affirmed.

²² 868 S.W.2d 101 (Ky. App. 1994).

SEARCH & SEIZURE - CURTILAGE/CONSENT

Leach (James & Karen) v. Com.
2007 WL 2069818 (Ky. App. 2007)

FACTS: On April 15-16, 2005, The “West Kentucky Crimestoppers in McCracken County received anonymous tips” concerning the Leaches, stating that they were “dealing drugs, specifically cocaine, methamphetamine and marijuana, out of their house.” On April 22, Detective Carter and Dep. Riddle (McCracken County SO) went to the house to investigate. The tipster had “stated that the [Leaches] would not answer the front door to the home, but would come to the back door.” Detective Carter later testified that Dep. Riddle “had advised him that he (Riddle) had been to the residence before on a previous domestic call and that ‘everyone’ at the house on that occasion used the back door to enter and exit the house.” Notably, however, the opinion states that the information did not indicate “whether these people were all members of the Leach family.” Because of that information, however, the officers “immediately went around to the back door and knocked without first attempting entry via the front door.”

The opinion also notes that “to reach the back door, the officers had to walk down a driveway, pass a number of parked vehicles and go behind the house to a position not visible from the street.” In addition, the “back yard was ringed with an overgrowth of trees and bushes and had a garage in one corner” and “the parked vehicles and vegetation ... conceal the rear of the house completely from the street.”

When they reach the back door, they found the screen door closed but the interior back door open. Detective Carter “smelled the odor of marijuana.” When he knocked, “someone from inside yelled ‘come in.’” They did not enter however, and eventually James Leach came to the door. Detective Carter explained why they were there, but Leach denied any involvement in drug activity. He told the officers that he had a friend inside, and the detectives asked that the friend also come to the door. When he did so, both men were given Miranda warnings.

Detective Carter told the two that he had smelled marijuana coming from inside, and Leach admitted that there was a little marijuana and guns in the house, and that his wife was in the bedroom. The deputies detained the two men and requested consent, which Leach gave. He took them “through the house, pointing out the marijuana and guns.” He would not, however, let him enter his son’s room. Eventually, the deputies got a search warrant and found, in that room, more marijuana, paraphernalia and firearms.

Both of the Leaches were charged. They both moved for suppression, arguing that the “initial search of the house was improper because no warrant had been issued and there was no applicable exception to the warrant requirement.” They contended that the deputies “were illegally on the property when they smelled the marijuana because the back door of the house is part of the curtilage” which is a “protected private area ... not subject to a general search absent a properly issued warrant or an appropriate exception to the warrant requirement.” Their argument was essentially that the “presence of the officers in the protected area was inherently coercive, rendering Mr. Leach’s consent invalid.”

The trial court denied the motion, concluding that the deputies were lawfully at the back door and that the back door was “open for public use.” Both took a conditional guilty plea, and appealed.

ISSUE: Is the back door of a home part of the protected curtilage?

HOLDING: Yes

DISCUSSION: First, the Court addressed the issue of whether the back door was, in fact, open to the public. Using the same case upon which the trial court based its decision, Cloar v. Com.²³ the Court re-examined the issue of curtilage, stating that:

Curtilage is a protected part of an individual's property under the 4th Amendment of the United States. It is given protection because it is an extension of the home and can be used for intimate activity associated with the home.²⁴ The United States Supreme Court outlined four factors to be considered in determining whether property fell within the curtilage of one's home. The four factors to be considered are: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the house, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."²⁵ When this test is applied to the facts found in the case at bar, it is clear that the Leach's back door is undeniably part of the curtilage. The back door was concealed from the public roadway by the house itself, vehicles parked in such a manner as to conceal the back yard, and tall trees, shrubbery and the garage from the three remaining sides of the back yard. Additionally, as noted by counsel in the Appellant's brief, the back yard was being used to grow marijuana, which is a use certainly meant to be concealed from passersby. (We note that apparently the officers did not notice the marijuana plants located in pots on a table in the back yard until after the search warrant was obtained.) A cursory glance at the photos in the record establish that there was no pathway and the back yard of the property was not otherwise impliedly open to the public which would allow it to fall under the Cloar exception stated above.

Generally speaking, no reasonable member of the public would believe that a back door not visible to the casual observer would be open to him. There could be circumstances where members of the public could think that a back door would be open to the public. For example, if the front door is somehow inaccessible or there is no response to attempts to contact the inhabitants via the front door.²⁶ In this case, all we have to suggest that the back door is impliedly open to the public is an anonymous tip and the hearsay statement of one of the police officers that on a previous occasion he had been at the house and noticed that "everyone" used the back door to enter and exit. There was no testimony that those who used the back door included the public or even when this previous visit took place. Considering that the officer's previous visit to the residence was in response to a domestic disturbance, it is logical, without more information, to assume the only people involved were members of the family and that no members of the public were seen using the back door. We cannot in good conscious deem a back door to be impliedly open to

²³ 679 S.W.2d 827 (Ky. App. 1984).

²⁴ Oliver v. U.S., 466 U.S. 170 (1984).

²⁵ U.S. v. Dunn, 480 U.S. 294, 301 (1987).

²⁶ See, e.g., Warner v. State, 773 N.E.2d 239 (Ind. 2002) (police who received no response at front door properly went to side door).

public use based on an uncorroborated anonymous tip and the single previous experience of one of the officers.

In the case at bar, the Court found that the officers admitted they did not try the accessible front door, and concluded that the officers were improperly on the curtilage. Further, the Court found that because of that illegality, the “consent was not valid when given” because it was not voluntary and was coercive.

The Leach’s pleas were reversed and the case remanded.

SEARCH AND SEIZURE - CONSENT

Gordon v. Com.

2007 WL 1532706 (Ky. 2007)

FACTS: A series of burglaries occurred in Carroll, Henry and Owen between Oct. 6 and Nov. 1, 2004. During the burglaries, jewelry, cash, change and handguns were taken, but no long guns, although they were available. The same day as one of the burglaries, Gordon and Marshall were videotaped at a Kroger store, using a Coin Star machine, and it could be seen that the change was in two distinctive containers taken during that burglary. The victim, suspecting that this might have occurred, was permitted to watch the surveillance video and spotted the pair. The victim, Kinman, contacted the Sheriff’s office, and the Sheriff requested the store contact the office should the pair return.

Sure enough, following the Nov. 1 burglary, the pair returned to the store, and the store manager contacted the Sheriff. Sheriff Maiden arrived as they left the store and recognized them from the tape. He watched Gordon, who had the cash, hand some of it to Marshall. Sheriff Maiden stopped them and kept them from leaving, and questioned them about their activities. Jewelry and gloves were visible in the vehicle. The Sheriff obtained an arrest and a search warrant.

A variety of items were found in the car, in particular, items from several of the break-ins. They went to Gordon’s address, as listed on his OL, and were told he was living with his sister. They went to that address and received consent to search, finding more items from the break-in. At Marshall’s home, again they got consent from Marshall’s sister, who actually rented the apartment and shared it with her brother, and found more items from the burglaries.

Both were charged with multiple counts of burglary and receiving stolen property. Gordon moved for suppression, and was denied, and the case went to trial. Gordon was convicted, and appealed.

ISSUE: May a primary tenant consent to the search of an entire apartment?

FACTS: Yes

DISCUSSION: Gordon argued that his sister lacked capacity to consent to a search of the room he occupied in the apartment she rented. The opinion noted that room had no door, only a curtain, and that the three (sister, boyfriend and Gordon) shared a “common possessory interest” in the apartment and that each had authority to grant consent to search the entire residence. The Court noted that it had “previously determined that third-party consent will be considered valid where a reasonable police officer faced with the

prevailing facts would reasonably believe that the consenting party had common authority over the premises to be searched.”²⁷

The Court found that the “sister’s rights as primary tenant of the premises were at least co-extensive with [Gordon], as a person merely staying with her, if not superior to [Gordon’s].” In Sarver v. Com., the Court had “held that third party consent was valid from the person who paid rent on the residence to be searched and who claimed to have dominion over it.”²⁸ Further, in Colbert v. Com., the Court had “held that a parent as homeowner could consent to the search of the bedroom of [an] adult child, who did not contribute rent or have an agreement with his mother for exclusive control of his room.”²⁹ The Court has interpreted that opinion to state that a “separate bedroom occupied by a family member, not contributing rent, is not considered to be beyond control of the head of the household.”

However, even if the Court found differently, it noted that it “would still consider the search to be valid.” The officers could reasonably believe that Gordon’s sister “could consent to a search of the entire apartment.” Next, Gordon argued that it was improper to permit “‘extensive’ evidence from Sheriff Maiden that items found in [Gordon’s] car were burglary tools” and that the Court should have admonished “the jury that the sheriff was speculating about those items.” However, the Court noted that defense counsel had objected to the characterization, and that the objection was sustained. Further objections concerning the Sheriff’s description of each item, which included a lug wrench, a screwdriver, a brake spoon and finger cots. The Sheriff had been permitted during testimony to speculate about the usage of each item, and the Court agreed that “Sheriff Maiden should not have been allowed to characterize the items found in the car as burglary tools.”

The Court concluded that the Sheriff’s improper testimony was harmless as regards the conviction for receiving stolen property. However, the “burglary convictions present a more difficult question.” There was no direct evidence placing Gordon at the scene - no witnesses, no fingerprints. The tools in question “were the sort that could reasonably be found ... in the trunk of any car.” The “only evidence that tied [Gordon] to the burglaries was the sheriff’s improper, speculative testimony that the tools found in [Gordon’s] car were not only burglary tools but were also the tools used to commit one of the burglaries.”

The Court reversed the burglary convictions but upheld the conviction for Receiving Stolen Property

SEARCH AND SEIZURE - CRIME SCENE

Robinson v. Com.

2007 WL 1300967 (Ky. App. 2007)

FACTS: In July, 2003, Robinson and Blackburn lived together, outside of Inez. On July 12, Blackburn’s family gathered to celebrate her birthday, but she did not appear as expected. They asked Deputy Fitzpatrick (Martin County SO), who was also the son of Blackburn’s landlord, to check on her. Fitzpatrick got a key and went to the residence, accompanied by another deputy. After the deputies knocked and checked on the windows, they entered. Eventually, they ended up in the attic and

²⁷ Com. v. Nourse, 177 S.W.3d 691 (Ky. 2005); U.S. v. Gillis, 358 F.3d 386 (6th Cir. 2004).

²⁸ 425 S.W. 2d 565 (Ky. 1968).

²⁹ 43 S.W.3d 777 (Ky. 2001).

"immediately sensed the foul odor of decay." They found Blackburn's body under a "heap of curtains" and surrounded by blood.

The deputies left and notified their office, which in turn, notified KSP. Detective Bowman (KSP) arrived, entered with the deputies, viewed the body and "arranged to have it removed." One of the detectives "used a saw to cut out a small section of the wall at the bottom of the attic stairway which appeared to bear a blood hand print." The opinion noted that "[n]othing else was removed from the residence until the officers had obtained a search warrant."

Robinson, who was immediately the primary suspect, was eventually arrested. He requested suppression, which was denied. He took a conditional guilty plea of manslaughter, and appealed.

ISSUE: May officers enter a residence to check on the welfare of a resident?

HOLDING: Yes

DISCUSSION: Robinson argued that the warrantless entries violated his rights and that all evidence, including the body, should have been suppressed. The Court noted that other courts have found an exception to permit officers to enter and "render emergency aid" and to search for a missing person, when it is "reasonable to believe that a missing person may be in imminent danger and also reasonable to believe that the residence is the most likely place either to find the person or to gain evidence of the person's whereabouts."³⁰ The Court found that "[p]eople do not fail to attend their own birthday dinners without offering some explanation, and in any event we decline to say that family members must miss their loved one for some minimum amount of time before they may become legitimately concerned about that missing person's welfare." For example, "[a]n absence that would not be particularly worrisome in one case might be alarmingly out of character for another."

Next, the Court found that Detective Bowman's entry to view the body, and its removal, did not violate any constitutional provisions either. Blackburn's body was "certainly plain-view evidence that had been discovered in the course of legitimate emergency activities." The Court did acknowledge that the removal of the hand print might have been unlawful, but that did not taint the removal of the body.³¹

Robinson's conviction was upheld.

SEARCH & SEIZURE – VEHICLE STOPS

Simpson v. Com.
2007 WL 4355528 (Ky. App. 2007)

FACTS: On Sept. 24, 2006, Trooper McWhorter, along with other officers, was "conducting a safety road check in Muhlenberg County." He spotted a "vehicle approach a stop sign a short distance from the roadblock" and sit for approximately two minutes. The driver of that vehicle eventually turned right, away from the roadblock. Trooper McWhorter decided to follow. As he did so, he saw the "vehicle weaving in

³⁰ See Hughes v. Com., 87 S.W.3d 850 (Ky. 2002).

³¹ Although the Court did not note, the warrant would have mitigated the unlawful removal of the handprint, as it could have been removed under the provisions of the warrant. Thus, it was inevitable discovery.

the lane, back and forth from the center line to the fog line" and that the rear plate was not illuminated. Believing the driver might be intoxicated, he made a traffic stop. He found the driver, Simpson, "swearing and grinding his teeth" and suspected that Simpson might be on methamphetamine. Simpson failed several FSTs, and admitted that he "was a habitual user of methamphetamine, marijuana and Xanax." McWhorter was arrested.

Trooper McWhorter found a locked box in the search incident to arrest. Simpson provided the key to the box and inside, the trooper found 23 grams of methamphetamine and other items.

Simpson requested suppression, arguing that the stop was unlawful. The trial court denied the motion, finding the trooper's reason for the stop justified. Simpson took a conditional guilty plea, and appealed.

ISSUE: Is following a vehicle that evades a roadblock permissible?

HOLDING: Yes

DISCUSSION: Simpson argued that "there was no evidence that he was operating the car in violation of the law." The Court found that the "testimony of Trooper McWhorter constitute[d] substantial evidence to support the trial court's" decision, including his reason for originally following the vehicle. The appellate court agreed that there was sufficient reasonable suspicion to support the original stop. Simpson's plea was upheld.

Prather v. Com.
2007 WL 543394 Ky.App.,2007

FACTS: On April 11, 2005, members of the Buffalo Trace Narcotics Task Force in Mason County spotted Prather driving. Agent Fegan was familiar with Prather and suspected that he might be driving on a suspended license. He called via radio to confirm that fact. Officer Hamm, Maysville PD, also knew Prather's history and pulled him over. Prather produced a license, but Officer Hamm was able to confirm that Prather's license was suspended. Prather was then arrested. Officers, including Agent Fegan, searched the passenger compartment and found ammunition and pieces of wood that appeared to be from a shotgun stock. Prather denied having a key to the trunk.

Prather was taken to jail, and when searched, the officers found a bag of cocaine and a trunk key. The key was taken back to the scene, where the vehicle remained, and they used the key to access the trunk. Inside, they found digital scales with a white residue and a handgun. Eventually, the vehicle was taken to impound.

Prather was charged, and requested suppression. The trial court found that the search of the passenger compartment was a proper search incident to arrest and that there was further probable cause to search the trunk. Prather then took a conditional guilty plea, and appealed.

ISSUE: Is knowledge that a driver's license is likely suspended sufficient reason to make a traffic stop?

HOLDING: Yes

DISCUSSION: The Court quickly found that “Officer Hamm’s knowledge that Prather’s license had been suspended was sufficient to satisfy the Terry standard” and that the stop was therefore justified. In this case, the officer had valid reason to suspect that Prather’s license was suspended. Prather argued that most people are not arrested for that offense, but are, instead, only cited, but the Court noted that since the license had been suspended for Prather’s prior failure to appear on a speeding ticket, an arrest was appropriate.

With regards to the trunk search, the Court concluded that at the time of the search, the officers knew Prather was a convicted felon and that they had found ammunition and pieces of a wooden stock inside the passenger compartment, and that cocaine had been located during the booking search. The Court found that sufficient to justify the search of the trunk.

Prather’s plea was upheld.

Deboy v. Com.
214 S.W.3d 926 (Ky. App. 2007)

FACTS: On April 29, 2003, Deboy was spotted driving by a Williamsburg officer. The officer had stopped Deboy a few months previously and believed that he was driving on a suspended operator’s license. Along with Deboy, two passengers were in the vehicle, “including Daniel Brown, Deboy’s girlfriend’s son.” Deboy was arrested for driving on the suspended license and searched. During that time, the officer “noticed ‘a lot of movement in the vehicle from the other two passengers.’”

The arresting officer removed the passengers from the vehicle and patted them down, and then proceeded to search the vehicle. He found three handguns, all loaded, one under the front driver’s seat, one under the front passenger’s seat and one under a blanket in the back seat. All three occupants were charged with CCDW, and Deboy was additionally for possession of a handgun by a convicted felon.

Brown was called to testify. He stated that he had borrowed Deboy’s car earlier on the day in question and had placed the weapons where they were found, and that he “failed to remove them before returning the vehicle to Deboy.” Deboy claimed that he had no knowledge of the guns.

Deboy was convicted, and appealed.

ISSUE: Is knowledge that a driver’s license is suspended in the recent past sufficient to justify a traffic stop?

HOLDING: Yes

DISCUSSION: Deboy first claimed that the traffic stop was illegal because the officer lacked “reasonable suspicion” that Deboy was “engaged in criminal activity.”³² Deboy argued that Collier v. Com. supported his argument that the “prior record of a suspect can never, standing alone, justify a Terry stop.”³³ However, the Court noted, “the officer did not stop Deboy because of his prior record” but instead, “the officer made

³² See Simpson v. Com., 834 S.W.2d 686 (Ky. App. 1992).

³³ 713 S.W.2d 827 (Ky. App. 1986).

the stop because he believed that Deboy was committing the offense of driving on a suspended license." The Court noted that other appellate courts (outside Kentucky) "have consistently held that an officer's knowledge that a driver's license was suspended at some relatively recent time is sufficient to create reasonable suspicion of unlawful activity and support an investigatory stop of the vehicle." Given that the officer had stated that he'd known that Deboy's license was suspended for a relatively short period of time, less than "several months," the Court found no error in the trial court's "determination that reasonable suspicion existed for the officer to make the stop."

Deboy then argued that the "Commonwealth did not prove he had knowledge the handguns were in the vehicle" and that in fact, the "uncontroverted evidence was that he did not have such knowledge." The Commonwealth argued that "the evidence was sufficient because it proved Deboy had constructive possession of at least the handgun under his seat." The Court noted that previous case law had created the general rule that "[t]he contents of an automobile are presumed to be those of one who operates it and is in charge of it, and this applies particularly where the operator is also the owner...."³⁴

The Court found that "Deboy was the owner and operator of the vehicle, and the handgun was found under the seat where he had been sitting," and upheld his conviction.

Geary v. Com.

2007 WL 543632 (Ky. 2007)

FACTS: On Feb. 19, 2004, at about 1:40 a.m., Deputy Thomas (Union County SO) noticed a car parked at Doug's Tanning World in Waverly. Because a number of break-ins had occurred in the area in the past, the deputy decided to investigate and pulled in near the suspect vehicle.

When Deputy Thomas first spotted Geary, Geary was "out of the parked car, apparently getting a soft-drink" from a vending machine. Deputy Thomas spoke to Geary, and Geary "seemed overly nervous while talking to him." Geary returned to his car and Deputy Thomas approached the vehicle on foot.

As Deputy Thomas approached the vehicle, "he could smell propane." The driver, Burden, told Deputy Thomas "that they were coming from Evansville and going to Madisonville." Deputy Thomas was suspicious "because he did not think it made sense for them to be going through Union County if they were headed to Madisonville." He noted that Burden was "so nervous that he was shaking."

Deputy Thomas asked if they had any "burglary tools with them, such as pliers." They denied it, although the deputy "could see a pair of channel-lock pliers laying in the backseat next to another passenger, Jerry Oakley." When asked for identifying information, Oakley gave a false name and address, but provided the correct information when challenged. Deputy Thomas had Oakley get out and sit on the ground. When he patted him down, he found Oakley to be carrying a walkie-talkie and a torch lighter, both suspicious because such radios are commonly used during the theft of anhydrous ammonia and the lighters are "used to heat pipes to smoke methamphetamine." Thomas had Burden get out of the car and asked him about burglary tools. Burden gave permission for a search of the trunk. Inside, Thomas "found a propane tank with a loosened valve, an air tank with a discolored brass valve, and a garden hose with a plastic fitting taped to it." (The brass fitting had turned to a bluish-green color, an indication that it had been exposed to

³⁴ Dixon v. Com., 149 S.W.3d 426 (Ky. 2004).

anhydrous ammonia.) The trunk also contained a large duffle bag that “would make it easier to carry the propane tank.”

Thomas told the three men that he knew there was a place with anhydrous a mile away and that he would be checking that site. He expressed his concern for safety. Oakley replied that “No, we haven’t got any, yet.” Thomas took this reply as an admission that they had planned to steal anhydrous ammonia.

Geary, along with the others, was eventually convicted of conspiracy to theft of anhydrous ammonia with intent to manufacture methamphetamine, and PFO 2nd. He then appealed.

ISSUE: May the presence of a vehicle at a closed business in the middle of the night support an investigatory stop?

HOLDING: Yes

DISCUSSION: The Court noted that the Circuit Court had “concluded that the totality of the circumstances [as detailed above] justified the investigatory stop made by Deputy Thomas.” “The time and location of the stop, along with the behavior of [Geary] and the presence of the pliers abundantly warranted Deputy Thomas’s suspicion.” The stop was based on a reasonable articulable suspicion and the Court found the motion to suppress was properly denied.

The Court further upheld the conspiracy conviction, finding that the information provided was sufficient to suggest “an agreement among all participants” and that “conspiracy may be and is often proven by circumstantial evidence.”

Geary’s conviction was affirmed.

Durham v. Com.
2007 WL 1192037 (Ky. App. 2007)

FACTS: On Oct. 22, 2003, Officer Davis (Springfield PD) “observed a vehicle driving erratically.” When Officer Davis checked on the plate, he learned that it was both expired and belonged to a different vehicle, so he stopped it. Hensley was driving the vehicle, with Durham as the passenger. When Hensley opened the window, Davis “detected a strong smell emanating from the car and saw eight cans of starter fluid in the back seat” and a “yellow bucket with white residue in it.” Believing he might be seeing a “rolling methamphetamine lab,” Officer Davis called for assistance, and Deputy Davis (Washington County SO) responded.

When the two occupants of the car got out, the officers realized it wasn’t a lab, but only a leaking can of starter fluid. They got consent to search, however, and found a “black bag wedged out of view between the driver’s seat and the console separating the two front seats” that contained methamphetamine, marijuana, rolling papers and a strip of foil. On the passenger side floorboard, they found “numerous battery casings stripped from lithium batteries, strips of lithium and related paraphernalia.” Both occupants of the car were arrested, and each was indicted on trafficking in methamphetamine, possession of methamphetamine and related offenses.

Hensley took a plea prior to trial, and agreed to testify against Durham. At trial, however, Hensley did not appear. Durham requested a directed verdict, arguing that there was no evidence linking him with the contraband found in the vehicle. (In addition, he argued that the "Commonwealth failed to provide discovery concerning a statement allegedly made by Hensley in which he admitted that the black bag was his" although other evidence seemed to indicate that the admission related to the starter fluid and other items that were in immediate view.) The Court denied the motion, and Durham was convicted of possession of the contraband. Durham appealed.

ISSUE: May a passenger be considered in constructive possession of contraband found in a vehicle?

HOLDING: Yes

DISCUSSION: The Court noted that "Kentucky law recognizes the concept of constructive possession with respect to drugs and contraband."³⁵ Usually, with vehicle passengers, the "general rule is that '[t]he person who owns or exercises dominion or control over a motor vehicle in which contraband is concealed, is deemed to possess the contraband."³⁶ However, the Court stated, "[t]his does not mean, however, that contraband found in an automobile cannot be 'constructively' possessed by someone other than the owner or driver." The Court agreed that the bag was accessible to Durham, as the passenger, and that further evidence was found on the passenger floorboard.

With regards to the statement, the Court noted that the defense counsel was actually present when Hensley made it. As such, there could be no Brady³⁷ violation for failure to disclose exculpatory evidence to the defense. The trial court's decision to deny the directed verdict was upheld.

Berry v. Com.
2007 WL 2405084 (Ky. App. 2007)

FACTS: On July, 7, 2005, Officer Mott (Richmond PD) received information from a CI that Berry was in Richmond to sell drugs. He was given specific information about Berry's vehicle. Mott shared that information with other officers, and further, told them that Berry had been previously arrested under federal drug charges. They spotted and began following the vehicle, during two stops at two different addresses. Finally, Detective Morris, seeing Berry make a turn without signaling, requested that a marked unit (Officer Eaves) stop the vehicle.

Eaves started writing the citation for the traffic offense, while Officer Stidham asked Berry for consent to search his person. Berry agreed, but Stidham found nothing. Berry denied permission to search his vehicle, however. Stidham told Berry he was calling for a drug dog, and while they waited, Officer Eaves completed the citation and gave it to Berry. After waiting 15-20 minutes, Berry gave consent to search, but Stidham elected to wait for the dog. When the dog arrived, it alerted on the driver's side of the vehicle, and during a subsequent search, the officers found "six plastic baggies containing white residue with one

³⁵ Burnett v. Com., 31 S.W.3d 878 (Ky. 2000); Pate v. Com., 134 S.W.3d 593 (Ky. 2004); Hargrave v. Com., 724 S.W.2d 202 (Ky. 1986).

³⁶ Leavall v. Com., 737 S.W.2d 695 (Ky. 1987).

³⁷ 373 U.S. 83 (1963).

containing a small amount of cocaine.” Approximately 22 minutes elapsed between the initial stop and the alert. ”

Berry was charged and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May officers delay a traffic stop to wait for a drug dog if they have separate, reasonable suspicion that the driver is involved in illegal drug activity?

HOLDING: Yes

DISCUSSION: Berry argued that he was “illegally detained after the initial traffic stop had concluded” and as such, that any evidence found must be suppressed. Looking to Illinois v. Caballes, the Court distinguished this case by noting that this “was not a simple traffic stop,” but something more.³⁸ It found it more closely analogous to U.S. v. Davis,³⁹ in that Berry was already identified by a CI as a likely drug trafficker, and the behavior the officers observed corroborated that characterization. As such the “police had reasonable, articulable suspicion to believe Berry’s vehicle might contain evidence of drug trafficking.”

Berry’s plea was affirmed.

SEARCH & SEIZURE – ROADBLOCKS

Hurley v. Com.
2007 WL 29431 (Ky. App. 2007)

FACTS: On May 10, 2004, shortly after midnight, “Hurley was stopped at a roadblock in Laurel County. Sgt. Walker (KSP) later testified that Hurley was fidgety and had glassy eyes with dilated pupils. Upon questioning, Hurley admitting to having taken methamphetamine and Lortab. He was arrested for DUI. Deputy Hamblin (presumably of the Laurel County SO) then took his drug dog and went over Hurley’s vehicle. The dog alerted and the officers found methamphetamine in the vehicle.

Hurley later denied having taken methamphetamine and Lortab on the day he was arrested (although admitted to having taken both prior to that day) and denied knowledge of the methamphetamine in the vehicle. “The vehicle belonged to his mother and Hurley was just one of numerous individuals who had access to the vehicle.”

Hurley moved for suppression, arguing that the presence of the dog indicated that the “roadblock was conducted for the express purpose of locating and seizing drugs.” The prosecution countered with evidence that the purpose of the roadblock was “traffic safety” and that the dog simply accompanied the officer whenever he was on duty. Trooper Walker stated that the purpose of the roadblock was to “check driver’s licenses, registration, proof of insurance and to look for any other safety violations.” The Laurel Circuit Court denied the suppression motion.

Hurley was conviction of Possession of a Controlled Substance and DUI. He appealed.

³⁸ 543 U.S. 405 (2005).

³⁹ 439 F.3d 345 (6th Cir. 2005); see also Garcia v. Com., 185 S.W.3d 658 (Ky. App. 2006).

ISSUE: May a roadblock be established for traffic safety reasons?

HOLDING: Yes

DISCUSSION: The Court noted that “[a]utomobile checkpoints or roadblocks must be deemed reasonable in order to comply with the Fourth Amendment.”⁴⁰ Such roadblocks may not “be conducted for the primary purpose of uncovering evidence of ordinary criminal wrongdoing.”⁴¹

In this case, the roadblock was in accordance with KSP policies and procedures. The dog was with Deputy Hamblin simply because the dog always was, and noted that the “drug dog did not exit the cruiser while the checkpoint was being conducted, and was only used to search Hurley’s vehicle after Hurley was arrested.”

Hurley raised the decision in Com. v. Buchanan⁴² in defense of his position, and the Court quoted extensively from that opinion. Using factors outlined in that opinion, the Court concluded that the checkpoint was “minimally invasive and permitted under the law.”

The Laurel Circuit Court’s decision to deny the motion to suppress, and Hurley’s conviction, were affirmed.

Smith, Bruin, Hendricks and Conner v. Com.
219 S.W.3d 210 (Ky. App. 2007)

FACTS: On June 18, 2005, after an event at the Kentucky Speedway near Warsaw, KSP set up a checkpoint in Grant County. This roadblock was part of the “Hundred Days of HEAT Campaign” which was intended to reduce traffic-related fatalities during the summer months.

Sgt. Miller set up the roadblock pursuant to KSP policy and chose from a pre-approved list of locations. A press release was sent out statewide concerning the campaign and media announcements were made. Trooper Mills was in charge of the specific checkpoint at issue.

The checkpoint was set up with visibility in mind, to ensure that oncoming motorists would be forewarned. Every vehicle was stopped, until such time as Trooper Mills believed “that it was no longer safe for the motorists due to the backed-up traffic caused by the checkpoint.” At that time, the checkpoint was shut down and traffic was allowed to thin out, at which time the checkpoint was restarted. Entire groups of vehicles were apparently stopped at a time and the “vehicles were not chosen randomly for a stop, and there was no exercise of discretion involved in choosing which vehicles from the group to stop.”

Smith, Bruin, Hendricks and Conner were all stopped at the checkpoint during the course of the day, and all four were charged with DUI. Each moved for suppression, arguing that the “discretionary decisions made by Trooper Mills to stop and restart the checkpoint multiple times” rendered the checkpoints unconstitutional. A joint hearing was held on the issue, and the trial court denied the motions.

⁴⁰ Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

⁴¹ City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

⁴² 122 S.W. 3d 565 (Ky. 2003).

All four took conditional guilty pleas, and appealed. At their appeal of right to the Grant County Circuit Court, the Court noted that the procedures were "entirely reasonable," and the case was remanded back to the trial court. The four then requested discretionary review by the Kentucky Court of Appeals.

ISSUE: May a checkpoint be stopped and started, for traffic related reasons, and still be found to be lawful?

HOLDING: Yes

DISCUSSION: The Court noted, as a start, that "stopping motorists at a traffic checkpoint constitutes a seizure under the Fourth Amendment of the United States Constitution." From that point, however, "the question then becomes whether the seizure was reasonable." The Court noted that checkpoints for traffic related reasons, including sobriety checkpoints, are constitutional, so long as the "officers were not permitted to exercise their discretion while conducting the checkpoint."⁴³

Further:

For a checkpoint to be constitutional, it must be executed pursuant to a systematic plan, and the officers conducting the stop should not be permitted to exercise their discretion regarding specifically which vehicles to stop.

The Court found that in this situation, the checkpoint was done properly, and was constitutional. Specially, Trooper Miller's decision to "stop and restart the checkpoint multiple times" was done for an appropriate reason.

The Grant Circuit Court's decision was affirmed.

SEARCH AND SEIZURE - WARRANTS

Drake v. Com.
222 S.W.3d 254 (Ky. App. 2007)

FACTS: On March 25, 2005, at about 9 p.m., Sheriff Simon and Dep. Durst (Grayson County SO) went to Drake's trailer home to serve civil process. Because the front door lacked a porch, they went to the rear. There, they "smelled the odor of ether and ammonia coming from around the deck and the back door" and spotted a "twenty-ounce HCL generator under the deck." They recognized the odor as indicating a methamphetamine lab. Simon stayed at the trailer while Durst went for a warrant.

When Durst returned with the warrant, the two officers executed it, finding methamphetamine related items. Drake was indicated on a variety of charges. He requested suppression, which was denied. Drake then took a conditional guilty plea, and appealed.

ISSUE: Does the odor of ether constitute sufficient probable cause for a search warrant?

HOLDING: Yes

⁴³ Delaware v. Prouse, 440 U.S. 648 (1979).

DISCUSSION: Strange argued that the odor detected was insufficient to support probable cause. The Court noted that although Kentucky did not yet have law directly on point, that other jurisdictions “have held that odor either alone or in conjunction with other facts and circumstances can provide probable cause.

The Court upheld the denial of the suppression motion, and accepted the plea.

Bowen v. Com.
2007 WL 1784016 (Ky. App. 2007)

FACTS: On January 25, 2002, Bowen’s home in Russell was searched by Fivco Area Drug Enforcement (FADE) Task Force officer, pursuant to a search warrant. The affidavit read, as follows:

A concerned citizen that they had observed on numerous occasions and particularly on weekends, a high volume of traffic going to and from the BOWEN residence. Persons would enter the residence, stay only a short period of time, and exit the residence.

Acting on the information received, affiant conducted the following independent investigation:

On or between the dates of January 15th, 2002, and January 18th, 2002, officers of the FADE Task Force conducted surveillance at the residence of MARCUS BOWEN located at 100 Crestview Road, Russell, Kentucky. BOWEN was observed leaving the residence in a 1995 GEO Prism, baring [sic] Kentucky registration 993-GBM, where surveillance was maintained by FADE officers to a location in Greenup County where BOWEN delivered a quantity of Cocaine to a known drug dealer; that in turn sold the Cocaine to a FADE undercover detective. During the course of another transaction, prior to the aforementioned date, the known drug dealer stated to a COOPERATING WITNESS that MARCUS BOWEN delivered the Cocaine that the COOPERATING WITNESS had purchased. This conversation was overheard and tape-recorded by FADE officers. BOWEN was identified by FADE detective DAVID SMITH on both of the aforementioned occasions.

Officers found drug-related items, including cocaine and marijuana and drug paraphernalia. Bowen moved for suppression and when that denied, he took an Alford plea. He appealed.

ISSUE: May corroborated but stale information be used to support a warrant?

HOLDING: Yes

DISCUSSION: Bowen first argued that portions of the warrant “were stale and materially false.” He noted that the original anonymous tip was from a citizen some seven months prior to the warrant request. Following that tip, the officers set up several successful controlled buys, thereby corroborating that tip. The information obtained during the buys “provided a sufficient nexus between the anonymous tip from the concerned citizen and Bowen’s residence.” As such, even excluding the tip, the Court found sufficient probable cause to support the warrant.

Bowen’s plea was upheld.

Pate v. Com.
2007 WL 1536851 (Ky. 2007)

FACTS: On Sept. 17, 2002, Sgt. Lilly (KSP) was “tasked to execute an arrest warrant on” Pate. Outside the residence, Sgt. Lilly saw “ a black pressure tank sitting outside [Pate’s] door with what appeared to be a green corroded fitting on the top and a section of pipe with a valve welded to the bottom.” Sgt. Lilly explained at trial, later, that he had been trained to notice such corrosion as a “sign that the tank has been used to hold anhydrous ammonia.”

Pate’s wife, Kathy, answered the knock. Sgt. Lilly explained his purpose for being there, and she stated that Pate was not home. He asked to enter to check, and Kathy Pate agreed. When Sgt. Lilly entered, he saw numerous items that suggested the presence of a methamphetamine lab. He asked her what the “stuff” was, and she replied that it was what her husband used to cook methamphetamine. Sgt. Lilly called for assistance and seized the evidence. Sgt. Lilly found Pate in a nearby apartment and made the arrest. Pate complained about the items being taken from his apartment and “blurted out that the officers would find no methamphetamine residue on the items.”

Both Pates were indicted, and Kathy Pate agreed to testify about her husband. Pate was convicted, and appealed.

ISSUE: May items related to methamphetamine manufacture be seized without a warrant?

HOLDING: Yes (but see discussion)

DISCUSSION: First, Pate argued that the seizure of the equipment from his apartment violated his rights, and that Kathy Pate’s consent was coerced. The Court quickly found that Sgt. Lilly’s actions were appropriate and that he had simply asked for entry to check for Pate. The trial court found her “consent was voluntary and not coerced.” Next, Pate argued that Sgt. Lilly had no right to seize the items and that the “plain view exception to the warrant requirement is inapplicable since the incriminating character of the items was not ‘immediately apparent.’”⁴⁴ The Court found that Sgt. Lilly’s experience made the character of the items spotted immediately recognizable as the equipment necessary for a meth lab - making them immediate subject to seizure.⁴⁵ Pate further argued that the items inside opaque plastic containers would not have been obvious, but the Court found that the seizure was justified under the “risk of danger to police or others” rationale.⁴⁶ Finding the extreme risk of items connected to methamphetamine labs, the Court noted that the seizure was justified, even though no toxic chemicals were ultimately found.

Pate also argued that the trial court erred in permitting Kathy Pate to testify against her husband, under KRE 504. However, the Court noted that the “marital privilege” does not apply when the “spouses conspired or acted jointly in the commission of the crime charged.” Kathy Pate pled guilty to facilitation to manufacture and “was very knowledgeable about the equipment, its purpose, and what [Pate] was doing with it” She pled guilty to a lesser offense to avoid a conviction on the great. Kathy Pate’s testimony was admissible.

⁴⁴ Hazel v. Com., 833 S.W.2d 831 (Ky. 1992); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

⁴⁵ Texas v. Brown, 460 U.S. 730 (1983).

⁴⁶ See U.S. v. Atchley, 474 F.3d 840 (6th Cir. 2007); U.S. v. Plavcak, 411 F.3d 655 (6th Cir. 2005); U.S. v. Bishop, 336 F.3d 623 (6th Cir. 2003).

Pate's conviction was affirmed.

Hampton v. Com.
2007 WL 4355617(Ky. App. 2007)

FACTS: On June 9, 2006, Officer Cobb (Lexington-Fayette PD) was patrolling in an area "known for narcotics trafficking and prostitution." At about 2 a.m, he "noticed a brown automobile parked on the side of the road in front of a tractor-trailer rig." Officer Cobb pulled alongside and saw Hampton, the driver, "looking down in into his lap." Cobb "motioned for Hampton to roll down his window" but instead, Hampton opened the door and started to step out. "Hampton yelled to Officer Cobb that everything was okay and then sat down in the car and closed the door." Officer Williams arrived. Officer Cobb decided to investigate further and backed up so he could shine his spotlight on the car. As Cobb stepped out of his cruiser, Hampton started the vehicle and drove off.

Officer Williams followed and signaled, with his emergency lights, for Hampton to pull over. Hampton turned into the parking lot of a local motel and "sped to the rear of the lot." He then jumped out and "ran toward a wooded area and drainage culvert bordering the parking lot." Both officers followed and captured him. When they returned to the vehicle, Cobb spotted white powder on the ground near the open door. The officers found 3 baggies of crack cocaine and a digital scale when searching the car.

Hampton was arrested, and eventually indicted, on multiple counts of trafficking and related charges. He requested suppression, arguing that Officer Williams was wrong in following him, and that his car was illegally searched. The Court disagreed.

Hampton took a conditional guilty plea, and appealed.

ISSUE: Does a suspect's departure, before an officer has concluded an investigatory traffic inquiry, constitute flight that justifies a vehicle stop?

HOLDING: Yes

DISCUSSION: The Court reviewed the standards for first, the investigatory stop. The Court disagreed with Hampton that Cobb's "suspicions were extinguished at the conclusion of their brief encounter." The Court agreed that simple presence in a high crime area is not enough, but noted that, in Illinois v. Wardlow,⁴⁷ that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." The Court quickly concluded that the officer "had a reasonable articulable suspicion that Hampton was engaging in criminal activity at the time of the investigatory stop."

Hampton argued that the encounter was over when "he told the officer everything was okay" but the Court noted "that Hampton unilaterally ended the encounter with Officer Cobb." In fact, the Court agreed that "Hampton's evasive behavior obviously increased the officer's suspicions that criminal activity was afoot." As such, the court found that the "officers properly followed Hampton and attempted to stop his vehicle to continue their investigation."

⁴⁷ 528 U.S. 199 (2000).

With respect to the search, the Court agreed that the search was justified on a combination of the plain view and Carroll doctrines. When Officer Cobb “found what appeared to be crushed crack cocaine on the ground,” it was “objectively reasonable” for the officer “to suspect that additional contraband [crack cocaine] was located inside the car.” Further, the Court justified the seizure of the scales under the plain view, even though it was arguably “covered” by an “opaque plastic cover.” However “Officer Cobb reiterated that he was familiar with the type of scale and the small cover attached to it” and it was reasonable for the officer to seize an item he immediately recognized as drug paraphernalia.

DOMESTIC VIOLENCE ORDERS

Randall v. Stewart

223 S.W.3d 121 (Ky. App. 2007)

FACTS: Randall and Stewart dated for about a year and a half. On May 17, 2006, Stewart went to Randall's apartment in Louisville to have a discussion, and told Randall, at that time, that "she did not want to see him anymore." Randall allegedly grabbed her and they struggled, with Randall attempting to suffocate Stewart. Neighbors heard the struggle and went to her aid, and the police were called. Responding officers did not make a report or arrest Randall, but did advise Stewart to get an EPO, which she did.

On May 30, at the DVO hearing, Randall moved for dismissal, arguing that Stewart did not have standing to get a DVO. Stewart testified that they did not live together, but that Randall spent, on the average, two nights a week at her home and kept toiletries there, but not clothing. The Jefferson County Family Court judge found that relationship sufficient to give Stewart standing for a DVO.

Randall appealed.

ISSUE: Is a dating relationship sufficient to qualify for a DVO?

HOLDING: No

DISCUSSION: Randall used Stewart's own testimony, and applied the precepts of Barnett v. Wiley, to argue that they did not live together and that Stewart lacked standing to get a DVO.⁴⁸ The court reviewed the statute, and agreed that the issuance of the DVO was improper. (The Court further encouraged, however, the General Assembly to take up the issue of dating couples.)

NOTE: *The case does not indicate whether criminal charges for the assault were sought against Randall.*

SUSPECT IDENTIFICATION

Pritchard v. Com.

2007 WL 80035 (Ky. App, 2007)

FACTS: On July 1, 2002, Pritchard allegedly "approached a young woman as she was getting into her car as a Shell Five Star market, in Elizabethtown." He reached into the car, struck her in the face and stole her wallet, which was lying on the seat. Officers quickly responded and searched at the nearby motel, and encountered Van Winkle, the suspect's girlfriend. She gave them her room number and they proceeded there, where they got a consent to search the room.

The officers found \$119 in cash under the mattress, and also found clothing matching the description given by the victim. They also saw, outside the open bathroom window, a "clear plastic bag containing the

⁴⁸ 103 S.W.3d 17 (Ky. 2003).

victim's wallet." After giving the victim a few minutes to calm down, she was taken to the motel, and she identified Pritchard and the clothing.

Van Winkle testified later that Pritchard ran in, tossed the wallet at her and told her he'd gotten it from a "fat bitch at the store" and proceeded into the bathroom. Wanting nothing to do with a robbery, Van Winkle left the room.

Pritchard was convicted of First-Degree Robbery, and appealed.

ISSUE: Is a suspect entitled to have counsel present during a show-up?

HOLDING: No

DISCUSSION: Pritchard appealed on several issues, most of which were quickly dismissed. One issue of note, however, was Pritchard's argument that the victim's identification of him was flawed, "on the grounds that he was not afforded the opportunity to have an attorney present when that identification was made." The Court noted, however, that "Kentucky law is well established that it is not necessary for the police to delay such a 'show-up' identification in order to allow the suspect to have counsel present."⁴⁹

Pritchard's conviction was affirmed.

Wallace v. Com.
2007 WL 541934 (Ky. 2007)

FACTS: On the day in question, allegedly Wallace and another man entered Horton's apartment and robbed Horton and six of his guests. They were armed and wearing ski masks and "demanded that everyone present empty their pockets and relinquish all of their money." One of the female guests was physically assaulted and thrown to the ground and two others were struck. Horton and another guest, however, were able to subdue the two men when they became distracted.

When the ski masks were removed, one of the perpetrators was a friend of one of the partygoer's cousins, who was expected at the party but who had not yet arrived. The man admitted the cousin "had sent them." One of the men, later identified as Wallace, escaped before the police arrived, but the other man, Durflinger, was arrested.

Sgt. Hellinger (Louisville Metro PD) put together a photo pack that included Wallace. Three witnesses identified Wallace as the man who had fled from the scene. A warrant was issued but Wallace could not be located. More than five months later, however, Wallace turned himself in. Durflinger took a plea that involved testifying against Wallace. Wallace was convicted, and appealed.

ISSUE: May photos in a photo pack be somewhat different from the photo of the suspect, and still be acceptable?

HOLDING: Yes

⁴⁹ Savage v. Com., 920 S.W.2d 512 (Ky. 1995); Stidham v. Com., 444 S.W.2d 110 (Ky. 1969).

DISCUSSION: Wallace objected to the trial court's decision that the "out-of-court photo pack identifications" were admissible. The Court analyzed the situation under the precepts of Neil v. Biggers.⁵⁰ First, the Court discussed whether the "identification procedure was suggestive." In this case, Sgt. Hellinger identified Wallace as a suspect and used his photo to generate a photo pack from a computer program – with the computer randomly selecting five other photos based upon parameters set by the officer. Wallace agreed, but asserted that the parameters were not sufficiently specific. (Apparently the parameters included race, age, height and weight.) Wallace argued that there were "prominent disparities between his photo and the others in the pack – in that he "had a thinner face, more facial hair and a darker skin tone than four of the other men in the photos." The trial court recognized the "minor deviations" but overall found that the photo pack was acceptable.

The appellate court reviewed the photo pack as well, and found that the "trial court's characterization of the dissimilarities as minor deviations" was not so erroneous as to warrant reversal on that issue.

In addition, Sgt. Hellinger "recounted details of Durflinger's pre-trial statement and, in so doing, improperly bolstered Durflinger's testimony through prior consistent statements." Such testimony is generally impermissible under KRE 801A(a)(2). However, the Court found that the statements "were details that had not been elicited from Durflinger or that Durflinger did not recall during his testimony," not totally new information. (In addition, Wallace had not objected to the admission of the statements, which limited the ability of the appellate court to rule.)

Wallace's conviction was affirmed.

Greenwell v. Com.
2007 WL 1532658 (Ky. 2007)

FACTS: On June 5, 2003, Willett went to the lake with her family. They left and as Willett "was packing things into her car to go home" she "noticed a man approaching with a shotgun pointed at her." She spoke to him but he didn't respond. Willett got into her vehicle and tried to leave, but he "appeared at the door of the vehicle and demanded the keys." She refused, but he snatched the keys. She tried to get a second set, but the man "repeatedly ordered her out of the car." He finally shot her twice, wounding her seriously. "Willett played dead" and the man "disappeared into the woods." She called for help, and police and EMS arrived. She described the man as a "relatively tall white male with a large building, wearing blue jeans and a bandana." The investigating "officers took photographs and recovered two spent cartridges outside the driver's side car door" and then released the car to Willett's family. They took the car to be cleaned, and the "person who detailed the car found one live ammunition round under the passenger seat."

Greenwell became a suspect and Detective Snow "assembled a photo lineup." The photo he used was a year-old jail booking photo in which Greenwell had a "bandana on his head. Detective Snow found five other photos, added a bandana to each photo and "made a black and white copy of the six-man photo array." Willett "identified Greenwell as a possible suspect, but then stated that another subject more closely resembled her assailant." Greenwell was arrested on another charge, and "Snow then assembled a new photo array" - using Greenwell's new booking photo - "with the subjects portrayed in color." "However,

⁵⁰ 409 U.S. 188 (1972).

none of the subjects in the first photo array - other than Greenwell - were included in the second photo array." When presented with the photos, "Willett immediately identified Greenwell as her assailant."

Following his arrest, "Greenwell moved to suppress the out-of-court identification, and Willett's in-court identification, claiming an unduly suggestive procedure." The trial court denied the motion and admitted the evidence. Greenwell further sought a "missing evidence jury instruction" because he was not given the opportunity to examine the car prior to it being cleaned, but again, he was denied.

Greenwell was convicted, and appealed.

ISSUE: Is it a concern to offer a witness two different photo arrays, with only the identified subject in both?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court first discussed the issue of the photo lineup. The Court noted that:

There are no allegations that Detective Snow influence Willett's decision or that Greenwell's picture was overtly distinct from the other subjects in either photo lineup. It is troubling, however, that Detective Snow replicated only Greenwell's picture in the second photo lineup. Our concern is heightened by the fact that Willett was unable to make a definitive identification during the initial photographic lineup. Although she did indicate from the first photo lineup that the man who shot her resembled Greenwell, she also pointed to another man's picture and said that his face looked more like the man who had shot her. Only when presented with the second photographic lineup that included Greenwell - but none of the other subjects from the initial lineup including the man she had earlier identified - did Willett conclusively identify Greenwell as her assailant.

The Court expressed concern that the identification was influenced by Willett's possible recognition of Greenwell from the earlier array. By excluding the other man she had identified, it conveyed the message that her "tentative selection" of that other man was not correct. However, although the Court stated that "using multiple photo arrays in which only the suspect's photograph appears in each is bad practice and will be subjected to heightened scrutiny" that in this case, the "practice did not open the door to misidentification or infringe Greenwell's right to a fair trial." In this situation, the Court noted that there were "substantial differences in the two photos of Greenwell" and as such, "its inclusion ... did not constitute an unduly suggestive procedure." The Court "was convinced that [Willett] was attentive and "her description ... matched Greenwell in all material respects." The Court upheld the identification.

With regards to the missing evidence issue, the Court noted that there was no indication of bad faith, and that while it was "true that having the car detailed may have destroyed potentially exculpatory evidence, there [was] no evidence that the car was detailed at the behest of the Commonwealth." The investigators took photos of the vehicle, which were provided to Greenwell. The Court agreed that the denial of an instruction about missing evidence was appropriate.

Greenwell's conviction was affirmed.

Sullivan v. Com.
2007 WL 2744435 (Ky. App. 2007)

FACTS: On Aug. 23, 2004, just before 6 a.m., “Dooley was keeping vigil in the labor and delivery room” of a Louisville hospital, “awaiting the birth of her grandson.” Sullivan entered and they spoke for a few minutes, then he apologized, punched her in the face and ran away with her purse. Dooley alerted the nurses, who called security with a description of the suspect. A security guard spotted Sullivan “coming out of a loading dock area.” Since he matched the description, the guard followed him and watched him discard objects. (These items were later found to be from Dooley’s purse.) The guard stopped Sullivan and asked him to wait for police, and he did so.

Sullivan initially denied having been in the hospital, but admitted, after hearing discussion of a surveillance camera, that he’d been in the nursery to look at the babies. Dooley was brought down to the scene and “she positively identified him as her assailant.” Her purse was later found in the stairwell leading to the loading dock – the same one where he was spotted.

Sullivan was arrested, indicted, tried and convicted on robbery charges. He appealed.

ISSUE: Are show-ups, done within minutes of the crime, permitted?

HOLDING: Yes

DISCUSSION: Sullivan argued that the show-up identification was improper. The Court reviewed the guidelines for show-ups and agreed that Kentucky courts required that a claim of undue suggestiveness must be scrutinized “by examining the totality of the circumstances in light of five factors enumerated by the United States Supreme Court in Neil v. Biggers.⁵¹” Those factors include: “1) the opportunity of the witness to view the criminal at the time of the crime, 2) the witness’s degree of attention, 3) the accuracy of the witness’s prior description of the criminal, 4) the level of certainty demonstrated by the witness at the confrontation, and 5) the length of time between the crime and the confrontation.”

The Court applied the factors to the case at hand. The Court found that Dooley had adequate time and opportunity to see Sullivan clearly, she was awake and alert enough to later describe him accurately, she accurately described Sullivan, she “never wavered in her identification” and “took extra time” in making the identification and finally, less than thirty minutes separated the crime and the identification.

Sullivan’s conviction was upheld.

EVIDENCE - MISSING EVIDENCE

Hill v. Com.
2007 WL 858812 (Ky. 2007)

FACTS: Around May 5, 2004, Leitchfield PD officers went to the Whitehead home, but they found only Hill there. The officers spotted drug paraphernalia and went to get a search warrant. They found a

⁵¹ 409 U.S. 188 (1972).

number of items used in trafficking in methamphetamine, as well as a set of scales inside a bag with male clothing and "court papers" with Hill's name. The officers did not, however, take the papers into evidence, but only the scales found inside the bag.

Hill was indicted. Prior to trial, Hill attempted to have any mention of the papers excluded from the trial, but was unsuccessful. Hill was convicted, and appealed.

ISSUE: Must all evidence be collected?

HOLDING: No (but see discussion)

DISCUSSION: Among other issues, Hill argued that he was denied due process because the police did not "collect the court papers found in the bag with the scale" and that this indicated "bad faith." He implied "that the court papers would have been collected if they did not contain exculpatory evidence" and that a "missing evidence instruction" should have been given. The Court, however, found that there was nothing to indicate the papers were, in fact, exculpatory and as such, that such an instruction was not required.

Hill's conviction was affirmed.

Marcum v. Com.
2007 WL 1519345 (Ky.App. 2007)

FACTS: On Aug. 19, 2003, Sheriff Fee (Jackson County) "was near Marcum's property when he detected the odor of ether." As an experienced officer, Sheriff Fee recognized that chemical to be associated with methamphetamine manufacturing. He could see, "from his vantage point," "lye, a cooler, a fuel can, and" a container being used to capture the vapor from a chemical reaction." He left the area and returned later that evening with two officers, who "also recognized the odor of ether" and observed the items. The officers agreed what they observed was evidence of methamphetamine manufacturing.

The next day, Sheriff Fee got a search warrant and they returned to the property. They seized "all necessary equipment and most chemicals required" to make methamphetamine. Marcum was charged, and eventually indicted, on a variety of drug offenses. Marcum moved for suppression of the evidence, which was denied.

Shortly after the search warrant was executed, "several items seized from Marcum's property were disposed of by law enforcement in normal refuse containers." Other items classified as contaminated and/or hazardous materials were "sent to an incinerator for destruction."⁵²

Upon discovery, Marcum requested to inspect the items listed on the search warrant return. Because the evidence in question had been destroyed, Marcum argued that the charges should be dismissed. At the conclusion of the hearing, the Court denied Marcum's motion, but did reserve ruling on a "missing evidence instruction" until the trial, which never occurred. Eventually, Marcum took a conditional plea of guilty and appealed.

ISSUE: Is destruction of evidence prior to trial necessarily done in "bad faith?"

⁵² These actions were taken pursuant to KSP's policy for destruction of such items.

HOLDING: No

DISCUSSION: The Court first addressed the issue of the destruction of the evidence. "Marcum argue[d] the Commonwealth's destruction of some of the seized evidence prior to his having an opportunity to inspect, sample, or test the items was fatal to its maintaining charges against him." The Court looked to other cases and noted that "the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially nature of the evidence was apparent at the time it was lost or destroyed."⁵³ The Court, however, also noted that, in Collins v. Com.⁵⁴, Kentucky law held that "there is no denial of Due Process absent a showing of bad faith on the part of law enforcement or the Commonwealth in their failure 'to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated [Marcum]"

The Court noted that there was no argument but that the items were intentionally destroyed before being subjected to any testing, but stated that a list of the items, along with photographs, were provided during discovery. Although the Court noted that "better practice would have required such reference sampling" or "notice to Marcum of its intent to destroy the items with a reasonable opportunity for him to perform his own" tests, but that it found "no evidence of bad faith on the part of law enforcement, nor [did the Court] find any showing that the evidence destroyed held obvious potentially exculpatory value evident at the time of destruction."

The Court found that such policies requiring destruction "are necessary to ensure the safety of law enforcement officials." The Court found no indication that there was any rush to destroy the evidence and no indication that the "results of the testing might have exonerated Marcum, particularly in light of the totality of the evidence against him."

Further the Court noted that since Marcum pled guilty, it would not render an opinion on the trial court's failure to give the jury a "missing evidence" instruction.

Grey v. Com.
2007 WL 1532661 (Ky. 2007)

FACTS: "On or about the evening of February 7, 2003, Grey was involved in an altercation outside of a club in Lexington, Kentucky." Several shots were fired and Grey responded by shooting into a crowd, killing Henderson and wounding three other men. He then "threw his gun into a local reservoir."

Grey was indicted and went to trial. On the last day of the trial, Grey was notified that a "small caliber bullet had been found a few days after the shooting on top of a three-story building near the crime scene" – in fact, directly behind where Grey testified he had stood. The bullet had been turned in to the Lexington PD and subsequently destroyed. Outside the presence of the jury, officers testified about the "finding and destruction of the bullet," and Grey requested a mistrial. The Court denied it, "finding that there was nothing exculpatory about the missing bullet because both Grey and the Commonwealth freely admitted another person fired a gun at the scene and that the Commonwealth did not act in bad faith."

⁵³ Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

⁵⁴ 951 S.W.2d 569 (Ky. 1997); Arizona v. Youngblood, 488 U.S. 51 (1988).

Grey was convicted, and appealed.

ISSUE: Must a missing evidence instruction be given whenever evidence is, in fact, destroyed?

HOLDING: No (but see discussion)

DISCUSSION: The Court agreed with the trial court that “[i]n order for lost or destroyed evidence to be a violation of due process ‘the evidence must either be intentionally destroyed, or destroyed inadvertently outside normal practices.’”⁵⁵ Grey presented no evidence as to either, and at best, only speculated that the might be “potential exculpatory value” in the bullet. Grey further pressed that “he should have at least received a missing evidence instruction on the bullet.” Again, the Court found that the trial court was correct in not giving such an instruction.”⁵⁶

Grey’s conviction was affirmed.

Bobbitt v. Com.
2006 WL 2708534 (Ky. 2007)

FACTS: On April 2, 2004, a Dollar General store in Louisville was robbed. Shortly after it closed, the manager, Clarkson, locked the doors and collected the cash, placing it on top of the safe until the time-delay lock opened. A cashier, Robinson, told Clarkson that “she saw money lying outside on the sidewalk.” Robinson unlocked the door to retrieve the money, and a masked man came in and grabbed Clarkson. She told him where the money was and he released her. Clarkson then triggered the silent alarm from the office. Clarkson was also able to observe Robinson “hide behind a jewelry case” during the robbery. Over \$5200 was taken.

Detectives Arnold and Colebank (Louisville Metro PD) arrived and took a statement. Clarkson reported that “Robinson acted suspiciously that day and she received several phone calls at work, including one from her boyfriend, Kinnard.” She further stated that the robber’s voice sounded like Kinnard’s. Upon being questioned, Robinson admitted having a role in the robbery, and that Bobbitt, a friend of Kinnard, “had approached her about setting up a robbery.” She claimed the robbery was done without Kinnard’s knowledge. She claimed the robbery was supposed to have occurred earlier in the day, in a slightly different manner, and that “she did not know he would enter wearing a ski mask and take the cash.”

The detectives searched Robinson’s room, which she shared with Kinnard at his mother’s home. They found, on the front porch of the house, a sweatshirt and headband matching that worn by the suspect. Inside the bedroom, they found handguns, spent shell casings and “three bindles of crack cocaine.”

Robinson was charged with the robbery, and Kinnard charged with trafficking and possession of the firearm, since he was a convicted felon. (The opinion gives no indication as to why he was not charged with the robbery, since Clarkson had apparently identified his voice as that of the robber’s.)

Once they learned that Bobbitt had an outstanding warrant, the officers tried to arrest him. However, he “did not surrender and a foot chase” ensued, which resulted in Bobbitt suffering an injury and needing

⁵⁵ Tamme v. Com., 759 S.W.2d 51 (Ky. 1988).

⁵⁶ See Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

emergency medical care. Detective Arnold questioned Bobbitt about the robbery, and he admitted that he knew about it, but denied any involvement. Eventually, he too was arrested, and he and Robinson were both indicted for complicity to robbery.

Robinson pled guilty to facilitation to robbery and agreed to testify. The night before her scheduled appearance to testify, however, she contacted Detective Arnold and “admitted that Kinnard had planned the robbery.” She stated that Bobbitt had been recruited to assist, but that she didn’t know which of the two men actually committed the robbery. As a result, the trial was continued for two weeks. Upon learning that Kinnard had already pled guilty, Bobbitt moved to continue the trial, but was denied.

At trial, Robinson testified that Kinnard had actually done the planning and execution of the robbery, and that Bobbitt was originally supposed to come into the store and commit the actual crime. However, Bobbitt “got spooked” because Clarkson had seen his face, earlier, and refused to do so. (Robinson admitted that she had lied previously because she was in a relationship with Kinnard, had a child by him, and profited by the robbery.)

Bobbitt was convicted of complicity, and appealed.

ISSUE: Are defendants entitled to the entire available videotape of a criminal incident?

HOLDING: Yes

DISCUSSION: Among other issues, Bobbitt argued that his case was compromised because he was originally only provided (in discovery) with the “robbery time zone” of the surveillance tape. Apparently the Commonwealth had only an edited version of the tape, and provided that to the defense, although the investigator maintained, in his possession, the entire tape. Bobbitt only learned of the “afternoon portion” of the tape the day before the trial, and that video “showed a person coming to the window of the Family Dollar and walking away” - evidence that corroborated other witness testimony. Bobbitt argued that portion of the videotape should be excluded, because the prosecution “had failed to properly disclose that portion of the tape.” The trial court had permitted the introduction of the entire tape. However, the appellate Court stated that “the Commonwealth cannot claim ‘no foul’ because the detective had it” because “Detective Arnold was an agent doing investigation for the Commonwealth and therefore, the Commonwealth had a duty, pursuant to the court’s discovery order, to make it available or provide the [Bobbitt] with a complete surveillance video.”⁵⁷ The Court, however, found that in view of the fact that two witnesses testified as to the incident, the evidence was cumulative and found the trial court’s error to be harmless.

Bobbitt’s conviction was affirmed.

***NOTE:** In another case, however, the missing evidence might, in fact, be crucial to the defense, and its lack would then seriously compromise the investigation. Investigators should ensure that the file held by the prosecutors reflects all of the evidence in a case.*

⁵⁷ Anderson v. Com., 864 S.W.2d 909 (Ky. 1993); Akers v. Com., 172 S.W.3d 414 (Ky. 2005).

McKee v. Com.
2007 WL 1536852 (Ky. 2007)

FACTS: On Dec. 17, 2004, "Anthony and Michelle Wenrick, along with Michelle Wenrick's daughter, Shephanie [sic] Moore, traveled from Nicholasville to Jackson to visit Michelle's brother who was in the hospital." They then decided to visit Michelle's mother, who lived in Morgan County. Stephanie rode with Michelle's nieces who claimed to know the way, but eventually, the driver admitted to being lost and the Wenricks took the lead. Unfortunately, the Wenricks then encountered a vehicle "in their lane without its headlights on." Anthony, driving, was unable to avoid a head-on collision. Michelle was transported and died as a result, and Anthony was injured.

Sgt. Noble (Jackson PD) responded, finding a "male and a female conversing with each other in an overturned Toyota." He did not request an accident reconstructionist because he did not realize the seriousness of the wreck at the time. While the couple was being extricated, Sgt. Noble approached the other vehicle, determined that the driver was uninjured, and requested that he take a field sobriety test. The driver, McKee failed, so he was arrested and taken to the hospital. His BA was found to be .18.

McKee was indicted on Wanton Murder, Assault and DUI, and eventually convicted. He appealed.

ISSUE: May hospital medical records be used to prove intoxication?

HOLDING: Yes

DISCUSSION: McKee argued that it was improper for the prosecution to state that Anthony's medical records indicated he was intoxicated. The record indicated that there had been testimony about McKee's BA, and the forensic analyst had agreed that hospitals use a different standard in measuring blood alcohol. (It was a simple matter to convert the numbers, however.) During closing, the prosecutor had noted that Anthony's records probably indicated the hospital standard and that, if converted, would have indicated a negligible amount of alcohol. McKee argued that the evidence was highly prejudicial to him, as it undercut his defense theory that Anthony was also DUI and "could have been the cause of the wreck."

The Court noted that all of the evidence indicated that the prosecutor was correct and that the BA was noted using the hospital standard.

McKee's conviction was sustained.

EVIDENCE - BRADY

Wright v. Com.
2007 WL 79061 (Ky. App. 2007)

FACTS: On June 8, 2004, Wright and Hurt allegedly were involved in a drive-by shooting in Covington in which Heard was seriously injured. Hurt and Allen were feuding, and allegedly, Hurt drove near where Heard and Allen were standing and his passenger fired in Allen's direction, striking Heard.

Hurt and Wright were tried together, and several witnesses identified the vehicle as Hurt's. However, none of the witnesses knew Wright and they could not identify him positively as the passenger. There was also "conflicting testimony concerning the passenger's race and appearance." Hurt, however, identified Wright as his passenger, and stated that they went to Covington only to "fist-fight" with Allen and that when "he saw how many people were present he decided to postpone the fight." At that point, he stated, "Wright produced a handgun and started shooting."

Wright, however, stated that he'd been in Cincinnati playing basketball, and that Hurt was just trying to pin the crime on him because he was a juvenile.

Officer Manson, Cincinnati PD, testified that Wright had admitted to him that he'd been in Covington that evening. Manson had arrested Wright and given him his Miranda warnings, and at that point, Wright "denied any involvement in the shooting." Manson "counseled him to be truthful" and Wright then said he had been in Covington, but had not been involved in the crime. Manson told the investigating Commonwealth's Detective, but the information had been "inadvertently omitted from the detective's file and from the materials produced during discovery." During trial, the detective recalled Manson's statement.

Wright argued that it was a violation of his Miranda rights and the discovery rule, and demanded suppression of "any further reference to it." The trial court denied it, however, and Manson was eventually called as a rebuttal witness by Hurt.

Eventually, the jury convicted Wright of First-Degree Assault and Hurt of complicity. Wright appealed.

ISSUE: Are potentially exculpatory statements absolutely required to be documented and provided to the defense?

HOLDING: Yes

DISCUSSION: Wright argued that the failure of the Commonwealth to produce Officer Manson's report was a violation of such a magnitude that a new trial was required. The statement, although innocuous and not incriminating in itself, clearly contradicted Wright's "trial strategy" – that he was in Cincinnati that night. The Court agreed that the Commonwealth's failure to disclose the statement, and then introducing it at trial, "misled defense counsel with respect to critical evidence and induced Wright to rely upon a defense he might not otherwise have asserted or asserted in the same way." The Court concluded that the "fairness of Wright's trial was undermined and its outcome thrown into reasonable doubt by the Commonwealth's failure to timely disclose Wright's potentially incriminating statement to his arresting officer.

Wright's conviction was reversed.

EVIDENCE – CRAWFORD

Heard v. Com.

217 S.W.3d 240 (Ky. 2007)

FACTS: On the day in question, Heard got into a fight with Angel Saunders, the mother of Heard's infant daughter. Heard had attempted to visit Angel at her grandmother's home, but the grandmother, Sara Saunders, would not admit him. Later, after the grandmother left the house, Heard kicked in the door, assaulted Angel and took the child with him.

When Sara Saunders returned home, she called the Lexington-Fayette PD, and Officer Gilbert responded. Angel Saunders had already admitted to her grandmother that Heard was her assailant, and further admitted it to Officer Gilbert. At some point, Heard called his own cell phone, which he had left behind, and spoke to an officer and a paramedic. Heard hung up and called back on the house phone, and the officers listened in as he spoke to Sara Saunders and to a paramedic. Heard admitted that he had struck Angel with his fists, but denied having struck her with a gun, as was alleged.

Angel was taken to the hospital, and the child was located with Heard's mother.

At trial, however, Angel Saunders refused to testify and did not respond to a subpoena. She "recanted her previous incriminating statements in an affidavit." Heard was convicted of criminal trespass and assault. He requested a judgment of acquittal or a new trial based upon Angel's recantation, but the trial court denied it. He then appealed.

ISSUE: May statements of a witness who does not testify be admitted through third-parties?

HOLDING: No

DISCUSSION: Heard argued to the Court of Appeals that his "Sixth Amendment right to confront his accuser" was violated by the court's admission "into evidence the victim's out-of-court statements made through Officer Gilbert and Dr. Wicker...." The Court of Appeals agreed that "portions of Officer Gilbert's testimony were improperly admitted in light of" ... Crawford v. Washington,⁵⁸ but found that the improper testimony was simply cumulative and thus not reversible error. The Supreme Court reviewed the issues raised by the Crawford challenge.

"Officer Gilbert was permitted to repeat what Angel had told him about the attack [Heard] made on her, events that had already occurred" During that discussion, she related no "information bearing upon the safety or whereabouts of her child" nor was there an "ongoing emergency." Angel was "safely in the presence of one or more police officers and the statements concerned violations of law." As such, the statements "were clearly testimonial and they should not have been allowed into evidence." However, the court then had to decide if the erroneous admission was harmless or not.

Heard argued that the following statements were improperly admitted and not harmless:

⁵⁸ 541 U.S. 36 (2004).

- 1) [Heard] had called and asked [Angel] if her grandmother was gone;
- 2) [Heard] showed up a few minutes after the call and threatened to kick in the door;
- 3) [Heard] did kick in the door;
- 4) [Heard] hit Angel in the head with a gun;
- 5) Angel refused to let go of the child;
- 6) when Angel did let go, [Heard] grabbed the child; and
- 7) [Heard] pointed a gun at Angel and said he would have shot her if the gun were not broken.

The Court concluded that while parts of the testimony was cumulative to that given by Sara Saunders, the Court could not "in good conscience declare that this erroneously admitted testimony was harmless beyond a reasonable doubt."

The Court reversed the conviction for Second-Degree Assault and remanded the case for a new trial. The Court further noted that, however, Dr. Wicker's testimony was properly admitted pursuant to the "medical treatment exception to the hearsay rule and that it was possible that Sara Saunder's testimony might be admissible as an excited utterance," but that would be for the trial court to determine.

Cross v. Com.
2007 WL 121823 (Ky. App. 2007)

FACTS: On April 9, 2001, at about 2 a.m., Cross returned to Clarkson's apartment, where he had been the day before. Later that day, about at 4:45 p.m., he called for a cab. At 6:12 p.m. a neighbor of Clarkson called police to report that a "large black man whom she did not know had broken down her back door," choked her until she became unconscious, taken prescription medications and money and left in Yellow Cab #786.

Meanwhile, in the cab, "Cross began rustling through a black fanny pack bag." He asked the cab driver if he was familiar with drug names found on prescription bottles in the fanny pack. As a result of the police report, Yellow Cab dispatch asked the cab driver, via the radio, for his destination. Cross became nervous, told the cabdriver to stop, paid his fare and got out. The cabdriver later turned over to police a cell phone he found in the cab.

Officer Schmidt responded to the victim, and interviewed neighbors. The description of the intruder was provided to possible witnesses, and "Clarkson knew from the description that it was Cross." During that time, the recovered cell phone, now in the possession of the police, "rang constantly" - and one of the "saved numbers matched the number of ... Clarkson's apartment." The next day, "ten bottles of the victim's medications" were recovered "near the original cab destination." The medication was documented and returned to the victim. Clarkson and Stovall (her roommate) were given the nickname of the suspect; they identified the nickname as belonging to Cross, and "provided a physical description of him which matched the description given by the victim."

Cross was arrested. He gave a statement that he purchased the medications from Stovall's teen-age son, but admitted that the intruder was "probably him."

Cross was indicted on charges of robbery and burglary, and other related charges. Prior to trial, the victim died, from unrelated causes. Cross was convicted on some of the charges. However, prior to the

resolution of his appeals, the Court decided the case of Davis v. Washington, and Cross renewed his appeal based upon issues resolved in that case.

ISSUE: Are statements made during a 911 call admissible under Crawford v. Washington?

HOLDING: Yes

DISCUSSION: The Court noted that in this case, the victim called 911 and reported what had occurred, and that this call "was made in the immediate wake of [Heard's] intrusion into the victim's home. The Court quoted extensively from Davis, and concluded that "when the 911 call is made to seek emergency assistance - it is nontestimonial and the confrontation clause is not implicated." The call in question "was without any aforethought of giving a statement for later use against Cross in a court proceeding." As such, the content of the 911 call was properly admitted and Cross's conviction was affirmed.

EVIDENCE - CONFESSION

Payne v. Com.
2007 WL 1378514 (Ky. App. 2007)

FACTS: Payne had allegedly been involved in the rape of his then 16-year-old daughter, in 1998 and 1999. His daughter had provided a detailed statement to a KSP investigator and a social worker concerning the abuse. Payne was approached at a local cemetery - they had received a call that "he was there and could be suicidal" - and he confessed to the rape. He provided a written confession. He repeated that confession two days later, to the KSP investigator and the social worker.

At trial, however, the victim "completely recanted her accusations against her father" and that she had given it because "the state trooper threatened her that if she did not give it, she would be taken from home." The trooper and the social worker testified to the contrary. Payne testified, stating that he confessed only because he believed if he did not, the children would be removed from the home.

Payne was convicted, and appealed.

ISSUE: Is a confession given by an intoxicated subject admissible?

HOLDING: Yes

DISCUSSION: Among numerous other issues, Payne argued that his confession was involuntary because "it was the result of mental duress and alcohol intoxication." The Court noted that a "confession is voluntary unless, under the totality of the circumstances, [his] 'will has been overborne and his capacity for self-determination critically impaired.'"⁵⁹ To decide, the Court must look to "both the 'characteristics of the accused and the details of the interrogation.'"⁶⁰

Since Payne did not allege any improper conduct on the part of the officers, the court looked to Payne's personal characteristics. Payne had been an officer for several years, he testified that he knew what

⁵⁹ Soto v. Com., 139 S.W.3d 827 (Ky. 2004).

⁶⁰ Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

questions he would be asked. He “signed a statement waiving his rights.” Although he was under the self-induced influence of alcohol, the court noted that he even appeared to have a plan, confessing in order to keep his children from being taken away from his wife, and this indicated that “his thinking was somewhat logical” by his own admission. The Court found the confession to be voluntarily given.

After resolving other issues, the Hickman Circuit Court’s decision was upheld.

TRIAL PROCEDURE

Warren v. Com.
2007 WL 541918 (Ky. 2007)

FACTS: On March 19, 2003, Hunter was visiting the Park Hill neighborhood to buy a Buick from Camp. He found Camp and others shooting dice, but Hunter did not want to play and did not want the men to know he was “carrying a wad of money.” He paid for the vehicle, leaving it in the parking lot. Later that same day, Hunter returned driving a Cadillac, and began to work between the two cars, apparently exchanging wires. He was talking to Camp at the time. When Camp stopped talking, Hunter looked up and saw two men, standing near the car, wearing hoodies.

The man standing nearest to Hunter pointed a handgun at him and demanded money. When Hunter didn’t respond immediately, he demanded money and the keys. Coleman showed up to help Hunter, but Hunter, “conscious of the weapon, told Coleman that it was okay, that he would give them his money and for Coleman not to try to fight them.”

Coleman was made to lie on the ground, but Hunter was forced into the trunk of the Buick. The men apparently eventually fled in the Cadillac. “The robber’s knowledge that both were his cars made Hunter believe that he was set up by someone in the neighborhood.” Eventually, the fire department was needed to get Hunter out of the trunk.

Hunter was able to get a name for the perpetrator, Warren, who he had seen around the neighborhood. Using that information, Detective Keeling put together a photo pack, and Hunter promptly identified Warren as the robber. (The second man was never identified.) Another witness, Miller, also identified Warren as the robber.

Warren was indicted on First-Degree Robbery and Unlawful Imprisonment for Hunter, and First-Degree Wanton Endangerment for Coleman, as well as PFO 2nd. During the course of the trial, Detective Keeling, the primary investigator, was asked whether he was “confident” that the right person was arrested, to which he agreed that he was. Eventually, Warren was convicted, and appealed.

ISSUE: May an officer offer an opinion in testimony as to guilt or innocence?

HOLDING: No

DISCUSSION: Among other issues, Warren argued that testimony obtained from Detective Keeling was an expression of opinion, rather than of fact. Although Warren conceded that expert witnesses may offer opinions, he “observ[ed] that the detective was not testifying as an expert on the matter.” The

Commonwealth argued that lay witnesses are permitted to give opinion testimony under KRE 701, but the Court noted that “KRE 701 does not present an open forum for lay witnesses to express any opinion.” A lay witness’s testimony is “limited to those [observations or inferences] which are both rationally based on the perceptions of the witness and helpful to an understanding of the witness’ testimony or the determination of a fact in issue.” In this case, the detective’s opinion “was not based on his own perceptions, but based on his assessment of the perceptions of others as told to him.” It was inappropriate for him to offer an opinion on guilt or innocence.

However, although the court found that Detective Keeling’s “testimony served improperly to reinforce Hunter’s eyewitness identification,” it was harmless error when combined with other admissible testimony proffered at trial.

Warren’s conviction was affirmed.

Powers v. Com.
2007 WL 29397 (Ky, App. 2007)

FACTS: In the early morning hours of May 20, 2002, Powers, “drove through the drive-through at Fresh Liquors in Lexington and asked to cash a payroll check belonging to his female passenger whom he represented to be Janet Daum, the payee on the check.” The manager, Ledford, noticed that there “were already two signatures in the endorsement area of the check” and became suspicious. He asked the couple to come inside and endorse the check in front of him. The woman “had no identification and asked Powers what name she was supposed to sign on the check.” Ledford told Powers that he would also need to sign the check and show ID, and after Powers did so, Ledford told them to wait. He then went to another room and called the police.

Officer Richards (Lexington-Fayette PD) arrived and found Powers and the woman, who claimed to be Janet Daum, and he interviewed them separately. Richards called the restaurant that had issued the check, and obtained a description of the payee (Daum) that did not match the female in the store. (She turned out to be Joyce Villareal.) Richards arrested both for Second-Degree Forgery and other charges. Villareal pled guilty and testified against Powers, who was ultimately found guilty..

Powers appealed.

ISSUE: May repeating a witness’s prior consistent statement be considered improper bolstering?

HOLDING: Yes

DISCUSSION: Powers argued that some of Richards’s testimony “improperly bolstered the testimony of Joyce Villareal.” In particular, the Court noted an exchange in which Richards gave a longer reply to a question that was a yes/no question, but the defense counsel did not object, nor ask for a admonishment. Powers argued that what Richards repeated was an inadmissible “prior consistent statement of Villareal’s which improperly bolstered her testimony to” the same effect, at trial. The trial court admitted that Richards’ testimony was improper, but that it “did not rise to the level of palpable error” warranting a reversal. The appellate court agreed, noting that the defense counsel chose not to make an issue of Richards’ testimony, and instead “chose to downplay the testimony and proceed with his questioning.”

(The Court further noted that the defense counsel had “aggressively impeached the credibility of Villareal at trial.”)

The Court further distinguished this case by noting that in other cases in which bolstering became an issue, the testimony was that of the victim of the crime, not a co-defendant’s.

Ultimately, the Court concluded that the “outcome of the case would have been the same even had the improper testimony of Officer Richards had not been offered or had defense counsel objected to the testimony.” The other evidence presented against Powers was very strong, and the Court affirmed his conviction.

Powers v. Com.
2007 WL 625360 (Ky. App. 2007)

FACTS: Prior to Sept. 16, 2003, Powers had been dating Toro. Even though they had broken up, Powers still had a key to Toro’s apartment and was in contact with her. On that evening, Toro went out with Webb and told him that “someone had been stalking her, but she did not identify the person.” When they returned from the date, Toro asked Webb to look through her apartment.

“Webb went inside and began checking rooms” and when he opened the bedroom door, “Powers came from behind the door and began hitting him on the head with a hammer.” After Toro screamed that she and Webb were just friends, Powers finally stopped. He had the couple sit down, and he continued to waive the hammer and threaten Webb. Webb asked to leave, and after promising not to call the police, Powers let him leave. (He told Webb that he would kill both of them if Powers did so.)

Upon leaving the apartment, Webb “flagged down a passing police car.”⁶¹ The responding officers encountered Powers walking Toro at knifepoint toward a nearby trailer park. He ran away, and told the “pursuing officers to shoot him or he was going to kill them.” When captured, he had the hammer and the knife in his possession. He “later gave a statement to the police admitting to the attack on Toro and Webb.”

Powers was eventually indicted, tried and convicted on various charges relating to the attack. He appealed.

ISSUE: May an unintentional use of evidence that was to be excluded result in a mistrial?

HOLDING: Yes (but see discussion)

DISCUSSION: Powers argued on appeal that the officer that took his statement threatened to charge him with attempted murder if he invoked his right to an attorney. However, the officer denied it completely, and the trial court found the officer more credible than Powers. The appellate court found no reason to overturn the trial court’s decision.

Powers also argued that he was entitled to a mistrial after the officer “read a portion of his statement that had been excluded.” Apparently the original statement included “I don’t know why I do things like this” –

⁶¹ The responding agency was later identified as the Radcliff PD.

and the parties had agreed that portion would be redacted (removed) and would be read to the jury as "I don't know why I did this." However, the officer read the original statement rather than the modified version. The mistake led to Powers requesting a mistrial, which the trial court denied, instead giving the jury an admonition and correcting the statement. The appellate court agreed that a mistrial was unnecessary, noting that there was no indication that the officer "intentionally read the original portion of the statement."

Powers' conviction was affirmed.

NOTE: Although the use of the excluded evidence did not result in a mistrial in this case, officers should be aware of any such exclusions or limitations on the introduction of evidence. In another case, the error might have resulted in the case being mistried.

Moore v. Com.
2007 WL 1192005 (Ky. App. 2007)

FACTS: In February or March of 1996, A.S. was allegedly abused by her stepfather, Moore. A.S. was approximately 5 or 6 years old when her mother left her, and her younger siblings, alone with Moore. A.S. was lying on her mother's bed when, she alleged, "Moore came into the bedroom and touched [her] under her nightgown and underclothes" and "inserted his fingers in her vagina." A.S. did not tell her mother about it until 1998, however. At that time, A.S. and her mother met with Detective Patrick (Scott County) and a representative of CFC to discuss the matter, and a taped statement was taken. After a year-long psychiatric evaluation, Detective Patrick taped a second statement.

On Jan. 24, 2000, Detective Patrick obtained a warrant for Moore, charging him with First-Degree Sexual Abuse. He was subsequently convicted, and appealed.

ISSUE: May an officer describe, in testimony, what the officer was told by a third party?

HOLDING: Yes (but see discussion)

DISCUSSION: Among other issues, Moore argued that Detective Patrick's "testimony describing what A.S. told him during his interview about the alleged sexual abuse was impermissible hearsay, because it served only to bolster the testimony of A.S." The Court noted, however, that "[u]nder certain circumstances, a police officer may testify about information furnished to him during an investigation." However, in Sanborn v. Com.,⁶² the Court emphasized that "there is no such concept as investigative hearsay." In this case, Detective Patrick "explained what he did after his interview with the victim and how this case came to court," and then "went into great detail about what the victim told him during the interview." Although the Court found that it was, effectively impermissible hearsay, the Court did not find that it likely affected the end result of the case.

Moore also complained that Detective Patrick was permitted "to testify that sexual abuse does not always result in physical evidence detectable in a medical exam." The Court agreed that Detective Patrick was not qualified to talk about "medical findings" as he was not qualified as a medical expert. Because the

⁶² 754 S.W. 534 (Ky. 1988).

responses he gave could have affected the jury's decision, the Court reversed the decision of the Scott Circuit Court and remanded the case for further proceedings.

Randolph v. Com.

2007 WL 1192028 (Ky. App., 2007)

FACTS: On Jan. 31, 2000, Randolph (age 18) and a friend (age 15) were riding ATVs. They "decided to find a car and drive around town." The juvenile was aware of a person who left their keys in their car, and they stole the Ford LTD, with Randolph driving and the juvenile acting as the lookout. They drove around Wayne County and eventually into Clinton County. They found a Camaro by the side of the road and they stopped - Randolph got inside that car. A KSP trooper drove past, and the juvenile took off in the original stolen vehicle. The trooper pursued that vehicle and radioed the local PD to check on the Camaro. Both were subsequently arrested.

Randolph was indicted in Clinton County for Theft and RSP, as well as unlawful transaction with a minor. The juvenile testified against him at trial. Eventually Randolph was convicted on attempt to commit theft (the Camaro), RSP (the Ford) and UTM. Randolph appealed.

ISSUE: Should officers avoid mentioning (in testimony) prior interactions with the defendant?

HOLDING: Yes (but see discussion)

DISCUSSION: Among numerous issues, Randolph argued that the court erred by permitting the jury to hear inadmissible testimony from the investigating officer. That officer, who was involved in Randolph's arrest, mentioned that he had recognized Randolph "from other cases that [he] ... had with him in the past." Randolph argued that a mistrial was needed. The Court found that the statement did not necessarily imply that Randolph had a criminal history and that no matter what, a mistrial was too extreme a remedy.

Randolph's conviction was affirmed.

Farris v. Com.

2007 WL 1159624 (Ky. 2007)

FACTS: Farris was accused of shooting and killing his housemate, Cumbers. He was subsequently indicted for murder. During the trial, Detective Day was to testify as to his "opinion that the murder weapon has misfired," but the defense counsel argued that he was not a firearms expert. The prosecution agreed, and the Court "ruled that Day should limit his testimony to the actions he undertook at the scene and the observations he made." However at the trial, when asked "if he made any observations about the live rounds he removed from the revolver, Day testified that the markings on the rounds indicated that they were misfires." (Day had found "one empty chamber, two expended cartridges, and three live rounds in the gun.) When Farris's counsel objected, the prosecution stated it would present later testimony on the issue from a firearms expert. Upon request, the prosecution "established from Day that he did not perform further testing on the revolver."

Warren Mitchell, a KSP firearms expert, later testified that the three rounds indicated they had misfired. Eventually Farris was convicted of Murder.

ISSUE: Should officers be aware of prior motions that would limit their testimony?

HOLDING: Yes

DISCUSSION: Farris objected to Day's improper testimony, but the Court agreed with the prosecution that the remedial action requested was sufficient. Farris had not requested an admonishment or other curative action as a result of the statement and as such, could not raise the issue on appeal. Given Mitchell's later testimony, the Court found that any error was harmless.

The conviction was upheld.

Com. v. Bussell
226 S.W.3d 96 (Ky. 2007)

FACTS: Bussell was convicted in 1991 of robbery and murder, in Christian County, and was sentenced to death. He appealed on procedural matters related to the trial, and was awarded a new trial. The Commonwealth appealed.

ISSUE: May the failure to produce reports prior to trial potentially cause a mistrial?

HOLDING: Yes

DISCUSSION: Bussell won a new trial on his argument that the prosecuted failed to "disclose all police reports and statements of witnesses expected to testify." The opinion summarized the content of the reports and discussed the need to determine if the "evidence withheld was material" and would meet "the standard of reasonable probability of a different result at trial."⁶³ The Court concluded the "while not every police report discussed during the evidentiary hearing was exculpatory ..., the cumulative effect of the information contained in those reports certainly suggested a reasonable probability that had the information been disclosed, the outcome of [the] trial would have been different." Kyles instructed that a prosecutor has a "duty to learn of any favorable evidence known to ... the police." The information contained in the reports could have been used by Bussell to "develop a rational defense."

The Court agreed that it was appropriate for the Circuit Court to conclude that the failure to disclose the reports materially affected the ultimate of the trial, and upheld the decision to award a new trial.

Debruler v. Com.
231 S.W.3d 752 (Ky. 2007)

FACTS: At about 7:25 a.m., in Owensboro, C.B., age 10, left to walk to school. On the way, she was grabbed by a man who tried to carry her off, but she "managed to free herself by slipping out of her overcoat." She saw the man climb over a fence and flee the scene. She was able to say he was Caucasian, but he was wearing a mask and gloves, which prevented further identification. She did, specifically, see that he wore "black work boots with yellow and black laces."

⁶³ See Kyles v. Whitley, 514 U.S. 419 (1995).

Shortly thereafter, less than a mile away, Riney was leaving a bakery when a man demanded her keys and tried to grab her purse. She screamed and resisted. Bystanders called police and followed the attacker, until he was arrested. Both bystanders and Riney identified Debruler as Riney's attacker.

Officers Morgan and Howard (Owensboro PD) brought police dogs to the scene of C.B.'s attempted abduction, some seven hours after the incident. Capt. Thompson had acquired two items of Debruler's clothing, a sweatshirt and a jacket, "for use in the tracking." Officer Morgan's dog, Bady tracked the scent to the entrance of the alley, where the scent apparently faded. Officer Howard's dog, Denise, also lost the scent at the same location.

Debruler was charged with Kidnapping (for C.B.), Robbery (for Riney) and on being a PFO. He was convicted of all charges, and appealed.

ISSUE: Is evidence of scent tracking by trained dogs admissible?

HOLDING: Yes

DISCUSSION: First, Debruler claimed that the tracking evidence should not have been admitted because the trial court denied his request for a Daubert⁶⁴ hearing, arguing that such evidence is "scientific testimony." The Court discussed whether "testimony from a trained dog-handler concerning the use of canine scent tracking" is "scientific expert testimony." The Court noted that the officers "did not testify as to any scientific technique, theory or methodology" or provide any "scientific explanation of a dog's ability to track a scent." Their testimony was limited to their observations and their interpretation of their observations "based on experience and training." As such, the Court held that "the practice of using trained dogs to track a human scent lacks the hallmark of scientific knowledge" needed for a Daubert hearing, and as such, it wasn't required or even advisable.

However, the Court held that "certain foundational requirements must nonetheless be met in order to ensure reliability." The Court looked to Pedigo v. Com.⁶⁵ for precedent, finding that case to "set forth the foundational requirements for admitting dog-tracking, or "bloodhound" evidence. In Pedigo, the court took "judicial notice of the use of canines in scent tracking" noting that:

It is a matter of common knowledge, of which courts are authorized to take notice, that dogs of some varieties (as the bloodhound, foxhound, pointer, and setter) are remarkable for the acuteness of their sense of smell and for their power of discrimination between the scent they are first laid on and others which may cross it.

The court, however, realized that such bloodhound evidence is "overly persuasive" to the jury stating that "[t]he very name by which the animal is called has a direct tendency to enhance the impressiveness of the performance." As such, the Court "enumerated very specific and detailed foundational requirements for the admittance of such testimony:"

[I]n order to make such testimony competent, even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it

⁶⁴ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

⁶⁵ 103 Ky. 41 (1898).

must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him.

Later Kentucky cases had followed that precedent.⁶⁶ The Court found, however, that in this case, the Commonwealth had met the standard and “provided sufficient foundation for admission of the testimony” in that the officers had produced information as to the bloodline of each dog, as well as records of their initial training, their ongoing training and certifications.⁶⁷

Debruler argued that the passage of time, and purported contamination, by the presence of other officers walking through the scene, rendered the information inadmissible. However, both officers specifically testified that the dogs could follow trails several hours old, and that both dogs displayed the ability to discriminate among multiple, overlapping tracks.⁶⁸ Although agreeing that the passage of time and the presence of competing scents might adversely affect the dog’s ability to track, that went only to weight and that could be addressed during cross-examination.

Debruler also challenged how the scent evidence was obtained and handled, but again, the Court noted that went to weight and credibility, not to inadmissibility.”

Debruler also argued that the prosecution erred in not producing the dog’s records prior to trial, but the Court noted that the defense was well aware that the dogs were part of the case and they failed to request the records. The Rules of Criminal Procedure does not specifically require prior production of such records.

Debruler’s conviction was affirmed.

NOTE: Early Kentucky case law on tracking dogs almost universally identifies the dogs as bloodhounds, a specific breed. However, this case suggests that the Court will accept other breeds of dogs as being capable of doing scent-discriminatory tracking as well.

INTERROGATION

Emerson v. Com.
230 S.W.3d 563 (Ky. 2007)

FACTS: Emerson’s mother, Vickie Monroe “owned and operated a tavern,” in Jefferson County, along with her husband, Emerson’s stepfather. Emerson told his girlfriend, Decker, “that his mother wanted

⁶⁶ Blair v. Com., 204 S.W.67 (1918); Brummet v. Com., 92 S.W.2d 787 (1936); Daugherty v. Com. 168 S.W.2d 564 (1943).

⁶⁷ From the opinion, it appears that Denise was certified in tracking by the Owensboro PD and that Bady was certified by the United States Police Canine Association.

⁶⁸ Bullock v. Com., 60 S.W.2d 108 (1933) upheld evidence admitted even though the bloodhounds in the case were not brought to the scene for some 18 hours after the crime, and Meyers v. Com., 240 S.W. 71 (1922) upheld a trail that was seven hours old.

Monroe (her husband) murdered" ... and "was putting pressure on him to do something about it." He told Decker that his mother had given him money to find someone to commit the murder, but that "he was thinking of doing it himself." He asked Crews (who was apparently connected to the girlfriend) to "obtain a gun to kill Monroe" - and a rifle was purchased from Wal-Mart by Hill, another friend.

Approximately a month later, Monroe was murdered in the early morning hours. Emerson picked up Crews and they rode around. At some point, Emerson stopped the car and Crews took a rifle from the trunk and threw it off the road. However, a witness was driving past and reported it to the police. The two men were stopped and after being questioned, were permitted to drive off.

At about 6 a.m., Emerson told Decker that he "had shot and killed Monroe and made it look like a robbery."

Emerson became a suspect, but initially denied involvement when questioned by Detective Davis. He was interviewed, agreed to and took a polygraph, and was interviewed a second time. In the second interview, he admitted "that he had hired a black man to kill Monroe, and buy and dispose of the gun." At that point, apparently, he was given his rights under Miranda.

Emerson was indicted for complicity in the murder and tampering with physical evidence. Prior to trial, he requested suppression, but was denied. He was convicted, and appealed.

ISSUE: Is a person who agrees to come to the police station for an interview in custody for Miranda purposes?

HOLDING: No

DISCUSSION: Among other issues, Emerson argued that his statements should have been suppressed. The Court noted, however, that the "evidence indicates that Detective Davis set up an interview with [Emerson] because he had been at the murder site in the early morning hours when the murder took place." The detective "had no information as to who had shot Gerald Monroe, and [Emerson] was not in custody." During the interview, Emerson "agreed to take a polygraph." He was told he could leave his cell phone in the interview room, and he claimed that "he no longer felt free to leave because his cell phone was in the other room." As a result of discrepancies in his statements to the examiner, Detective Davis questioned him further, and that was when he made his admission. After being given his Miranda rights, he signed a waiver and a confession. He showed police where the gun had been discarded and eventually gave another statement in which he admitted, specifically, shooting Monroe.

The trial court had ruled that he "was not in custody when the interviews began and could have left the police station at any time." The court looked to Stansbury v. California, to find that Miranda is only required when "there has been such a restriction on a person's freedom as to render him 'in custody.'"⁶⁹ Emerson argued that since he admitted he was "driving his mother's Lincoln, he was with Justin Crews, and they were in another county" that this information was incriminating, since he knew that a witness had reported the actions of the occupants of such a car. He also "thought the police knew about his disposal of the weapon." The Court, however, noted that "his 'knowledge' and suspicions are nothing more than the product of a guilty conscience." The Court further stated that Emerson "came to the detective's office voluntarily, was not monitored, was permitted to go to the restroom alone, and was told he was not in

⁶⁹ 511 U.S. 318 (1994); Watkins v. Com., 105 S.W.3d 449 (Ky. 2003).

custody.” He chose to leave the cell phone in the other room, and he could have retrieved it and left at any time prior to his admission.

The Court also quickly dismissed his argument under Missouri v. Seibert,⁷⁰ and that since he wasn’t in custody, Miranda wasn’t required, and thus, Seibert didn’t apply.

The Court affirmed the finding of guilt, but remanded for further proceedings on sentencing, as it held that the jury instructions regarding mitigation were flawed.

INTERROGATION - RIGHT TO SILENCE

Edmonds v. Com.

2007 WL 29400 (Ky. App. 2007)

FACTS: On Nov. 27, 2004, the Super Dollar Store in Lexington was robbed by a man (allegedly Edmonds) who “demanded money from the clerk and threatened him with a pocket knife.” Officers Brand and Noel responded and promptly arrested Edmonds “who matched the description of the robber” nearby. They took Edmonds back to the store “where the clerk identified him as the perpetrator.” (Prior to the show-up, Edmonds had been given his Miranda warnings.) Edmonds was taken to the police department and interviewed by Detective Cain, but he denied the crime. The next day, Officers Brand and Noel, however, interviewed him again, and Edmonds confessed.

Just before the trial, Edmonds requested suppression of the statement he gave to the two officers, arguing that the statement was taken in violation of his Fifth Amendment right against self-incrimination. During the hearing, the court noted that the interview between Edmonds and Detective Cain resulted in a loud argument, although the two arresting officers, who were outside the room, were not aware of the details of that argument. At the second interview, the next day, the two arresting officers once again gave Edmonds his Miranda warnings, and he indicated that he understood them. During that discussion, which Brand was taping, unbeknownst to Edmonds, Brand apologized for Detective Cain’s behavior – which Brand admitted was a subterfuge to gain rapport with Edmonds. During the discussion, Edmonds did state that he wanted to speak to an attorney, for the purposes of making a complaint against Cain, who he alleged assaulted him in the interview room, but not for the purposes of the robbery charge.

The trial court concluded that the officers had, in fact, “scrupulously honored Edmonds’ rights and had not coerced his confession.” Edmonds took a conditional guilty pleas to second-degree robbery, and appealed.

ISSUE: Does a statement from a suspect that they have “nothing to say” constitute an invocation of a suspect’s right to silence?

HOLDING: Not necessarily

DISCUSSION: First, Edmonds argued that he had invoked his right to remain silent during the interrogation by Detective Cain, and that Noel and Brand had failed to honor that invocation when they reinitiated the interrogation the next day. For the purposes of ruling, the Court accepted that he had invoked the right. (However, the Court noted that in Furnish v. Com., it had ruled that the statement

⁷⁰ 542 U.S. 600 (2004).

allegedly made by Edmonds, that he had “nothing else to say” was not an invocation, but instead, a denial of any knowledge of the crime.⁷¹)

The Court looked to Mills v. Com.⁷² to decide the matter. In Mills, the Court identified factor that the Mosley Court “relied upon in determining that police officers had scrupulously honored the defendant’s right to cut off questioning. These factors included:

- (1) Mosley was carefully advised of his rights prior to his initial interrogation, he orally acknowledged those rights, and signed a printed notification-of-rights form;
- (2) the detective conducting the interrogation immediately ceased questioning Mosley after he invoked his right to remain silent and did not resume questioning or try to persuade Mosley to reconsider his decision;
- (3) Mosley was questioned about a different crime more than two hours later at a different location by a different officer; and
- (4) Mosley was given a fresh set of Miranda warnings prior to the second interrogation.

The Court did not, however, make these factors “exclusive or exhaustive,” nor did they elevate any factor as being more important than the others. The “Mosley analysis is to be approached on a “case-by-case basis,’ examining all the relevant factors.” In applying those factors to the case it bar, the Court noted that Edmonds was given, and understood, his Miranda rights, that Detective Cain did not continue to question him after he stated he had nothing to say, and that “the second interrogation took place about twenty-four hours later at a different location and by different officers.” Unlike Mosley, however, the “second interrogation was in relation to the same crime.” The Court found nothing indicating that the officers sought to “undermine [Edmond’s] resolve to remain silent” and found no error in the trial court’s ruling upholding the admission of his statements.

Next, the Court addressed whether “his confession during the second interrogation was involuntary” as the “result of police coercion.” Edmonds argued that Cain’s actions the day before had made him more susceptible to “confessing the following day.” He stated that he was afraid, if he didn’t confess, that he’d be locked up with Cain again, and that Cain would hurt him. In Henson v. Com., the Court discussed police coercion.⁷³ The trial court had not addressed the allegations made against Cain, other than stating that “if true,” Cain’s conduct “was inexcusable” and found that the factors surrounding Edmond’s confession removed any taint that was possible from that first interrogation. However, the Court of Appeals noted that if the events did occur as alleged by Edmonds, which included a statement that Edmonds would be sent to prison where he would be sexually assaulted, as well as alleged physical contact made by Cain, could constitute impermissible coercion.⁷⁴

As such, the Court concluded that it was “necessary to remand to the trial court for findings of fact as to what occurred during the interrogation to Detective Cain on November 27, 2004” and did so.

⁷¹ 95 S.W.3d 34 (Ky. 2002).

⁷² 996 S.W.2d 473 (Ky. 1999); see also Michigan v. Mosley, 423 U.S. 96 (1975).

⁷³ 20 S.W.3d 466 (Ky. 1999)

⁷⁴ See also Arizona v. Fulminante, 499 U.S. 279 (1991) and Hager v. Com., 189 S.W.2d 867 (1945).

Cummings v. Com.
226 S.W.3d 62 (Ky. 2007)

FACTS: Cummings was arrested by Louisville PD officers in September, 2002. "He waived his Miranda rights and detectives began questioning him." He then invoked his right to counsel, and the officers immediately stopped the questioning and turned off the tape recorder. Detective Arnold stayed with Cummings, while Detective Duncan left the room.

Detective Arnold later testified that Cummings "initiated conversation with him." Detective Arnold told Cummings that "he did not know if he could talk with him since [Cummings] had already asked for an attorney." When Cummings insisted he wanted to talk, Detective Arnold advised him again of his Miranda rights. "None of this exchange was tape-recorded." Dets. Duncan and Wilfong listened from outside the room, and Detective Duncan instructed Detective Wilfong to go back and question Cummings about other rapes in which he was a suspect. "The tape recorder was eventually turned back on and [Cummings] made incriminating statements."

Cummings requested suppression, eventually, and Dets. Duncan and Arnold testified as to the above. Cummings stated, however, that while the tape recorder was off, Detective Duncan "threatened him and his family."

The trial court denied the motion, finding no evidence of any "coercion, threat, or discomfort" in the transcript. Cummings took a conditional guilty plea, and appealed.

ISSUE: May a suspect re-initiate interrogation after asking for an attorney?

HOLDING: Yes

DISCUSSION: The Court started its review by noting that "[i]n order to use statements, whether exculpatory or inculpatory, made by a defendant subjected to custodial interrogation, the prosecution must demonstrate that [Cummings] was advised of his Fifth Amendment rights, including the right to remain silent and the right to an attorney." If the waiver "knowing, voluntary, and intelligent," the statement may then be admitted. Further, "[o]nce an accused has expressed a desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."⁷⁵

In this case, the Court found no indication that Cummings' waiver was coerced in any way, and the transcript supported the assertions by the detectives as to what occurred. Once the Court determines that the "inquiries or statements were intended to initiate a conversation with authorities" and that the defendant gave a "voluntary, knowing, and intelligent" waiver of his right to counsel, the information was admissible.⁷⁶

Cummings' plea was upheld, but it was remanded for sentencing errors.

⁷⁵ Edwards v. Arizona, 451 U.S. 477 (1981).

⁷⁶ Oregon v. Bradshaw, 462 U.S. 1039 (1983).

Morrison v. Com.
2007 WL 1575305 (Ky. App. 2007)

FACTS: Morrison was arrested on May 14, 2003, and taken to the Fayette County Detention Center. He was placed in a holding cell. When he became combative, Officer Blair, who had dealt with him before, responded. Blair later related that Morrison has asked him to get him in the back (presumably the regular cells) because he was tired, and volunteered that he's "robbed some places." Blair questioned him about the places he had robbed or "hit" and Morrison described two robberies in detail. A jail supervisor overheard the statements and contacted Lexington PD.

Several days later, Detective Sarrantonio brought Morrison in for questioning, and gave him his Miranda warnings. Morrison agreed to talk and confessed to both robberies, providing numerous details. He was later identified by a witness in a photo lineup.

Morrison was indicted, and moved for suppression, arguing that Blair had improperly questioned him. The trial court agreed to admit the first statement, but stated that "Blair should not have gone forward with his questioning of Morrison after this initial statement" and that those replies would be suppressed. It declined to suppress the confession made to Detective Sarrantonio, however. Morrison took a conditional guilty plea, and appealed.

ISSUE: May an unsolicited statement, prior to being given Miranda warnings, be admitted?

HOLDING: Yes

DISCUSSION: Morrison argued that his statement to Detective Sarrantonio should have been excluded as a "fruit of the poisonous tree" of the original tainted questioning. The Court, however, found the "voluntary statement was sufficiently severable from the tainted and suppressed interchange that followed." Since he had been properly given his Miranda warning before he confessed, the Court found the confession to be properly admitted. The court noted that there was "no exchange between Morrison and Blair" but that, "[i]nstead, Morrison literally blurted out that he had 'robbed some places' in an unsolicited, unprompted statement -- perhaps because he had been drinking." However, "[r]egardless of the reason for his boasting or foolhardiness, whichever the case may be, he himself boldly made the statement." Blair was not interrogated in the usual meaning of the word, nor was there any coercion and at best, the comments occurred in the "course of casual conversation." The passage of time between the unwarned statement and the warned interrogation, six days, eliminated any possible taint, and in addition, the second statement took place in a different place and was with a different law enforcement officer.

The Fayette Circuit Court decision was affirmed.

CIVIL LIABILITY

Caudill v. Stephens

2007 WL 625348 (Ky. App. 2007)

FACTS: On the day of the incident, Caudill “held two men at gunpoint in his residence [in Rowan County] and called the police because he believed that the men were planning to commit theft.” However, the responding officers “freed the two men and instead arrested Caudill for unlawful imprisonment.” Caudill was released when he appeared in court, and the trial court determined that “no probable cause existed to believe he had committed a crime.”

Following his release, Caudill sued the three arresting officers, but the court granted summary judgment in the officers’ favor. Caudill appealed.

ISSUE: Is an officer’s decision concerning the existence of probable cause a discretionary duty?

HOLDING: Yes

DISCUSSION: The court outlined the standard to be met in such lawsuits. The Court noted that either the officer must be shown to have breached a ministerial duty or that the officer “acted in bad faith while conducting a discretionary act.”⁷⁷ As such, if an officer makes a mistaken but “good faith judgment call” the officer is protected by qualified immunity.

Caudill argued that a “peace officer’s probable cause determination and decision to arrest is always a ministerial act that does not enjoy qualified immunity.” However, the Court found more persuasive the view “that a peace-officer’s on-the-spot probable cause determination, as well as his decision whether to arrest, is an inherently discretionary act.”⁷⁸ Since Caudill did not “allege specific facts indicating that the officers’ mistaken arrest was made with malice or bad faith,” the Court found that the decision was a discretionary one and that qualified immunity was appropriate.

CIVIL - FALSE IMPRISONMENT

Dunn v. Felty

226 S.W.3d 68 (Ky. 2007)

FACTS: On Nov. 7, 1999, Dunn and his wife were at home, asleep, when they were awakened by neighbors arguing. When Dunn looked out, he saw police cars, and he was concerned that something may have happened to his stepdaughter. He went outside, “wearing sweatpants and flip-flops and a short-sleeved shirt pulled up on his arms but not yet pulled over his head.”

He spotted Officer Felty running up the stairwell and asked if he was there about his stepdaughter. Dunn later alleged that “without provocation, Officer Felty lost his composure and pulled the shirt, which Dunn was still in the process of putting on, off of Dunn’s arms.” They struggled, with Felty allegedly pinning Dunn

⁷⁷ Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

⁷⁸ Jeffers v. Heavrin, 10 F.3d 380 (6th Cir. 1993).

to the wall, choking him and striking him. Another officer arrived and together, they handcuffed Dunn. Dunn was arrested and remained in custody until that early evening. (The original call was domestic violence at another apartment.)

Dunn was charged with harassment, menacing and resisting arrest. On April 24, 2000, he was acquitted of two of the charges and received a directed verdict on the third. Dunn filed suit on April 4, 2001, against Officer Felty, the other officers and the City of Louisville, on claims of false imprisonment, excessive force, malicious prosecution, outrageous conduct and failure to train/supervise. Most of the claims were dismissed for failure to file in a timely fashion, within the statute of limitations. The few remaining claims went to the jury, which found in favor of the officers and the city.

Dunn did not appeal the jury verdict, but did appeal the dismissal.

ISSUE: What is the statute of limitations for a civil lawsuit under state law in Kentucky?

HOLDING: One year (for most claims)

DISCUSSION: The parties agreed that the statute of limitations for both false imprisonment and excessive force is one year.⁷⁹ However, the question arose as to when the statute began to run - whether when the cause of action accrued, the date of the arrest, or when the defendant was acquitted. The Court noted that an officer is "liable for false imprisonment unless he or she enjoys a privilege or immunity to detain an individual." The Court noted that for false imprisonment, the statute of limitation begins to run when the "alleged false imprisonment ends." The Court found that once he was arraigned, and was held pursuant to legal process, his false imprisonment actually ended. Since "favorable termination of criminal proceedings is not an element of false imprisonment," it was not necessary for Dunn to wait to file his lawsuit until his criminal proceedings ended. As such, the false imprisonment claim was time-barred and properly dismissed. The Court further noted that while a false imprisonment claim, once filed, may be stayed until the criminal case is concluded, it still accrues on the date of the arrest.

However, the malicious prosecution claim was not time-barred. The Court noted that this case "illustrates the point at which false imprisonment terminates and malicious prosecutions begins and eventually accrues. That claim arose when Dunn was arraigned, and "accrued upon a favorable termination of the criminal proceedings against him."

With regards to the excessive force claim, the court found that the cause of injury accrues at the time of injury, in this case, on the date of the arrest. Like the false imprisonment claim, it may be stayed until the end of the criminal case, but it is still subject to the statute of limitations.

The Court agreed that both the false imprisonment and the excessive force claims were time-barred.

⁷⁹ KRS 413.140.

EMPLOYMENT - DISCIPLINE

Gardner v. Hickman

2007 WL 2563405 (Ky. App. 2007)

FACTS: Gardner was hired as a police officer, by the City of Hickman, in August, 1999. The following year, he arrested Gilkey for possession of marijuana. At a suppression hearing in the case, Gardner testified that a urine sample, taken at the arrest, had been destroyed. However, that was not the case, and the County Attorney believed Gardner had committed perjury. As a result of this belief, and because Gardner had refused to provide the name of certain CIs who were potentially involved in "allegations that Gardner had misused the City's drug fund," the County Attorney had requested KSP conduct an investigation.

At the same time, the County Attorney told the City Manager that he would not accept any citations or arrests made by Gardner during the pendency of the investigation. The City Manager then suspended Gardner without pay, on April 23, 2002. On June 17, Gardner was arrested on charges of Perjury and Tampering with Physical Evidence, and the City Manager filed administrative charges against Gardner under KRS 95.765. At the administrative hearing, the Board of Commissioners voted to find him guilty of inefficiency and fire him. However, Gardner was never indicted on the criminal charges.

Gardner appealed the administrative decision. The trial court upheld Hickman's motion, which argued that their decision was not arbitrary and was supported by the facts. Gardner further appealed.

ISSUE: May an officer accused of criminal acts be fired, even if they are never actually indicted on the criminal offense?

HOLDING: Yes

DISCUSSION: Gardner argued that the County Attorney's actions were outside his scope of authority. The court noted that although his "instructions were not binding on the Circuit Clerk" that the "Clerk was able to make the informed decision that accepting Gardner's paperwork would only waste the court's time." The Court noted that any testimony given by Gardner when a charge of Perjury was pending would likely have been dismissed by the court.

Further, the Court noted that the Board had asked the County Attorney for information, but that it was reiterated that the County Attorney was not the Board's attorney. The decision of the Board was affirmed.

Cole v. City of Florence

2007 WL 2744428 (Ky. App. 2007)

FACTS: Cole started working for the Florence PD in 1997. Sometime after that, officers were issued laptops that served as Mobile Data Terminals (MDTs) - which included email for intradepartmental communication.

In 2002, the department screened messages for inappropriate content, and five officers were found to have misused the system. Cole was charged with having sent "embarrassing, indecent, profane and obscene

communications.” (Some of the messages used profane/obscene language, some “disparaged other police departments.”)

The five officers were “asked to write a letter explaining their inappropriate messages.” Four did so, “acknowledging their wrongdoing and expressing contrition.” “Cole, however, defended his messages as within the scope of legitimate police business, and did not express contrition.” He later agreed that “his letter could be construed as ‘sarcastic.’”

Chief Kaufman offered the four officers reprimands and counseling, which they apparently accepted. Cole was given a one-day suspension, and he filed a grievance, to be heard before the City Council.

At the hearing Chief Kaufman recommended that Cole be terminated, stating that “he believed Cole’s messages were worse than the other four officers, and that the other officers had demonstrated contrition, whereas Cole had not.” The City Council concluded that Cole was guilty of misconduct and terminated him. Cole appealed to the Boone circuit Court, which affirmed Cole’s dismissal. Cole filed a further appeal.

ISSUE: May officers who commit the same essential misconduct be punished differently?

HOLDING: Yes

DISCUSSION: Cole argued that the City Council “acted arbitrarily in determining that Cole violated the rules and regulations of the police department.” It is the “function of the hearing body” in such cases to decide “first, whether the officer has violated the rules and regulations of the department and if so, second, it must exercise its discretion in imposing a penalty.” Only the first is subject to judicial review, as “public policy requires that the matter of punishment and discipline of a police officer be left to the city.”⁸⁰

The record indicated that Cole admitted sending the messages in question, and it is not in dispute that Florence PD had a policy in place prohibiting such messages. The Court reviewed the text of the questionable messages and agreed that they violated the policy. As such, the City Council did not act arbitrarily.

Although Cole’s punishment was different from his fellow officers, the record indicated that he did not acknowledge his misconduct, and in fact, exacerbated it, when he wrote what he later agreed was a “sarcastic” letter, in response to an order to write a letter of apology. Cole argued that he was disciplined for exercising his right to have a review board. Of course, the Court noted, had Cole cooperated in the informal disciplinary review and accepted responsibility for his actions, he would not have been before the City Council at all.

Further, Cole argued that since the Unemployment Board found that Cole was not discharged for misconduct, that he had to be terminated for exercising his right to a hearing. However, the Court found that unemployment proceedings are not held to the same standard and the “principles of res judicata do not apply in relation to an unemployment benefits proceeding.”

The decision of the Boone Circuit Court was upheld.

⁸⁰ *City of Columbia v. Pendleton*, 595 S.W.2d 718 (Ky. App. 1980); *Stallins v. City of Madisonville*, 707 S.W.2d 349 (Ky. App. 1986).

OPEN RECORDS

WLEX Communications v. Lexington-Fayette Urban County Government 2007 WL 1300976 (Ky. App. 2007)

FACTS: On April 27, 2004, a WLEX reporter requested a copy of an April 27, 2004, 911 call concerning a student with a medical problem on a school bus. Within a few days, the LFUCG Division of police denied the request, citing that the telephone call was made by a juvenile whose privacy it was required to protect and because in fact, the call had been transferred to the Division of Fire and, as such, the PD did not have a dispatch record.

Two months later, LFUCG learned that the reporter had appealed the decision to the OAG and the OAG requested a copy of the disputed recording. LFUCG replied that the request had been denied pursuant to Bowling v. Brandenburg.⁸¹ The LFUCG argued that the release of such information “could not only have an adverse effect upon the person ... who placed the disputed call but that it could also be expected to have a chilling effect upon citizens’ use of the 911 system.” It offered instead a summary of the call.

During this time, LFUCG apparently realized that in fact, the Division of Police did have a record, since officers were dispatched to the scene. As such, LFUCG sent a copy of the summary to WLEX. Further, in a later letter, dated July 7, LFUCG noted that “it could not provide a copy of the 911 call recording as requested by that office because the computer-generated material had been destroyed -- pursuant to a regular retention schedule -- nearly two weeks before LFUCG received any indication that WLEX would challenge its decision.”

On September 9, 2004, the OAG issued a decision indicating that the request had been improperly denied, but did not find that LFUCG had “willfully concealed a public record.” LFUCG immediately appealed the decision, arguing that the OAG had “erred in concluding that it had improperly withheld the contents of the 911 recording from public disclosure.” The trial court granted summary judgment to LFUCG, and the case was appealed by WLEX.

ISSUE: Are 911 call recordings subject to disclosure under the Open Records Act?

HOLDING: Yes

DISCUSSION: WLEX argued that the 911 call recording was not exempt from disclosure and that the “juvenile caller’s privacy interest” was minimal. WLEX agreed that “[s]ince the recording no longer exists, [the Court] clearly cannot compel LFUCG to produce it for public inspection.” The appellate court, however, noted that since there is no “present, ongoing controversy,” it was unable to review the matter, since a decision to reverse the judge’s order would have no effect.

The Court did, however, decide to discuss the Bowling issue. It noted that the holding in that case required a “determination of whether the public has the right to examine particular materials as balanced against individual privacy rights” and “necessarily entails a case-by-case, fact-specific inquiry to determine whether the individual involved has a reasonable expectation of privacy -- and if so, whether that expectation of

⁸¹ 37 S.W.3d 785 (Ky. App. 2001).

privacy supersedes the interests of public disclosure of the requested materials *under the circumstances*.⁸² The Court found no reason to formally overrule Bowling, however.

⁸² Emphasis in original.

SIXTH CIRCUIT COURT OF APPEALS

CIVIL WRITS

Revis v. Meldrum

489 F.3d 273 (6th Cir. Tenn. 2007)

FACTS: As a result of a money judgment awarded against Revis in the Anderson County, TN, courts, Emerson (the winning plaintiff) requested and received writs of execution against real and personal property Revis owned in Roane County.

The writ stated:

You are hereby commanded to take from the property of Nathaniel Revis including in [sic] property listed below the sum of \$678,807.32 . . . to satisfy the judgment obtained by the plaintiffs You are further commanded to pay such monies, when collected, into the Court and you shall make return as to how you have executed this writ within the time allowed by law.

The writs were then forwarded to Dep. Eaton at the Roane County Sheriff's Office. He reviewed them, and unsure as to what to do, he asked the County Attorney. The County Attorney advised him that the "writs were valid court orders and were 'to be obeyed as stated on their faces.'"

On Oct. 18, 2004, at 6:25 a.m., Dep. Eaton and others went to Revis's residence, along with a representative of the creditor. A private moving company packed the contents of the house and moved the items, including valuable artwork, to a storage facility. In addition, the locks were changed on the house. Revis was escorted from the home and told he could not return.

Revis also alleged that Eaton searched him, apparently to determine that he wasn't "removing cash from the premises. (Eaton contended that he "simply asked Revis if he had any cash on him, and that Revis responded by showing him his wallet, which contained three dollars." The money was not taken from him.)

Seven days later, Revis posted an appeal bond and his property was returned. He then filed suit against all parties, including the Sheriff's Office defendants. After extended procedural litigation, the Sheriff's Office defendants were dismissed because the court found that they had committed no constitutional violation. Revis appealed.

ISSUE: Does a civil order to seize personal property from a location extend to evicting the occupant of the location, as well?

HOLDING: No

DISCUSSION: Revis agreed that the seizure of his property was proper, but argued that it was improper to search him and to evict him from the residence. The appellate court noted that the judgment was "silent concerning who is entitled to possess Revis's residence, and it provide[d] no notice to Revis that he was

subject to summary eviction.” Further, “an individual’s immediate loss of possession of his or her home plainly has greater adverse consequences than the loss of artwork or even a portion of an individual’s wages.” The Court noted that while exigency might justify the seizure of personal property, that “such concerns typically do not arise in connection with real estate.” The levy of an execution upon real estate does not serve to transfer title or to affect the actual ownership of the property. The Court concluded that Dep. Eaton was not permitted to levy an “execution upon a residence by evicting the owner without postjudgment notice and the opportunity to be heard.”

Finding that Dep. Eaton did violate Revis’s constitutional rights, the Court moved on to determine if Dep. Eaton was, nonetheless, entitled to qualified immunity. The Court reviewed Tennessee law on such writs, and noted that there was no settled law on the issue. The Court noted that the law “most likely was intended to do nothing more than direct the sheriff to give notice [to the occupant] that the property was subject to sale and return the writ.” However, the language on the face of the writ suggested that the was to take the property from Revis. The County Attorney gave Eaton no specific direction except to order him to obey the writ. Taking all of the information together, the Court found that a reasonable officer may not have realized that such actions violated Revis’s rights, and as such, he was entitled to qualified immunity.

The Court quickly dismissed that claim concerning the personal search, agreeing with the District Court that Eaton’s version was more credible.

Revis also argued that Roane County bore liability for failing to properly train Eaton, but the Court found that “Eaton ... acted properly by seeking legal advice as to how to execute the writ.” The County’s failure to communicate recent changes in Tennessee court rules concerning such writs did not amount to deliberate indifference, and dismissed that allegation as well.

SEARCH & SEIZURE

SEARCH & SEIZURE - TERRY

U.S. v. Wilson
506 F.3d 488 (6th Cir. 2007)

FACTS: On January 9, 2006, Deputies Moore and Jones (Lake County, Tennessee, SD) passed a car traveling in the opposite direction, bearing Kentucky plates. They noted that neither driver (Michael Jones) or Wilson were wearing seat belts, so the deputies made a traffic stop.

By the time the deputies walked up, both men were wearing seat belts. The driver produced a license with a Memphis address, but told Deputy Moore that he lived in Tiptonville, nearby. The driver “began talking and rambling and, in response to a question by Moore, ultimately admitted having served federal time on a gun charge.” Both occupants were “acting extremely nervous.”

Officer Moore checked the registration on the car and attempted to run both driver’s licenses. He learned that the vehicle was registered to neither of the men, and asked for proof of insurance and a registration. Both men searched diligently for the paperwork, and the driver (Jones) was also talking on the cell phone.

When told to end the call, Jones did so, but then told Wilson that “They’re coming.” Ultimately, the men were unable to find the documents requested.

Officer Moore asked for consent to search the car and the driver gave consent. Both men got out, on request, and “Officer Moore explained to Wilson that he needed to pat him down for the officer’s safety.” As he patted Wilson, “a package wrapped in gray duct tape fell from one of Wilson’s pant legs and landed on the ground.” The package was later found to contain 18 ounces of cocaine.

Moore tried to handcuff Wilson, who fought and escaped. Jones (the driver) also resisted arrest. Wilson broke free and “jumped into a car belonging” to someone who had “arrived at the scene in response to Jones’s cell-phone call.” Wilson, upon being captured later, admitted that the cocaine belonged to Jones and that he’d given it to Wilson to hold when they were stopped.

Both men were indicted on possession, and both requested suppression on the basis of an unreasonable search and seizure. The trial court denied Jones’ motion but granted it for Wilson, finding that “Officer Moore ‘had a reasonable belief that Wilson was armed and dangerous before conducting the pat-down search.’” The government appealed.

ISSUE: Does the Sixth Circuit recognize the “automatic companion” principle in Terry frisks?

HOLDING: No

DISCUSSION: The Court reviewed the standard for a pat-down frisk under Terry. Both parties cited U.S. v. Bell,⁸³ “in support of their respective arguments.” Bell involved the frisk of a passenger. In that case, the Court upheld Bell’s frisk, but “declined to adopt a so-called ‘automatic companion’ rule whereby any companion of an arrestee would be subject to a ‘ cursory pat-down’ reasonable necessary to give assurance that they are unarmed,” stating that Terry had “not been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates.”

Looking at the specific facts of this case, the Court concluded that the car was initially pulled over for a minor traffic infraction. Further “[i]f anything, the admission [of the previous gun charge] “suggests cooperation with authorities, not resistance.” Although “Wilson’s proximity to Jones was relevant,” it was “not dispositive.”

Looking to the facts presented by the government, the Court found that the fact that Wilson did not own the car was simply immaterial, as “[m]ost passengers do not own the vehicle in which they are riding.” Next, Jones’ statements did not reflect upon Wilson, and gave no indication that a passenger might be armed (and in fact, was not). Last, with regard to Wilson’s nervousness, even one of the officers testified that “it was fairly common for people to be nervous when he pulled them over.” Nervousness is simply not enough for a Terry frisk.⁸⁴

The Court concluded that “the government can point to no specific and articulable facts to justify the pat-down of Wilson on the basis of a reasonable suspicion that he was armed and dangerous.” The trial court’s decision was affirmed.

⁸³ 762 F.2d 495 (6th Cir. 1985).

⁸⁴ See U.S. v. Mesa, 62 F.3d 159 (6th Cir. 1995).

U.S. v. Dotson
2007 WL 1748137 (6th Cir. Tenn. 2007)

FACTS: On April 15, 2004, the Marlows left their home in Clinton, Tennessee. When they returned home that afternoon, they discovered they had been burglarized and various items were missing, including personal checks, a rifle, a handgun with ammunition, DVDs, an air pistol and four Bibles. Dotson's fingerprints were found on an empty ammunition box left behind.

The next day, Dotson and another man purchased cell phones with one of the checks at a local Target. Suspicious of the transaction, the loss prevention officer checked and learned the check had been stolen. When police arrived, they were directed to where the men had gone, elsewhere in the shopping plaza.

Police found Crawl, the second man, sitting in the car, and Dotson then emerged from the Shoe Carnival and returned to the car. Officer Dyer told them he had some questions for them, and they agreed to sit in the patrol car. Both were given Miranda warnings, but denied having passed the stolen check. The loss prevention officer, Gurgel, arrived and identified both men.

Officer Dyer then removed Dotson from the car, "conducted a full pat-down search" and placed him under arrest. During that second search, the officer "found one crumpled Marlow check in Dotson's pants pocket." After the two men were removed from the car, "Officer Dyer searched under the back seat of the patrol car and found a checkbook containing Marlow's checks" and an ID card with Dotson's photo but Marlow's name.

Dotson refused consent to search the car, but Dyer searched, finding a loaded pistol that matched with the list of items taken from the Marlow home, along with an ammunition box and more checks.

Dotson was charged with being a convicted felon in possession of a firearm and related charges. He moved for suppression but was denied. At trial, he admitted to having taken the checks and used them, but denied any involvement with the weapons. He claimed that Crawl had taken the guns and ammunition and hidden them in the car. Dotson was convicted, and appealed.

ISSUE: Must an arrest be made prior to the search incident to the arrest?

HOLDING: No

DISCUSSION: Dotson argued that a search warrant was required to search his car. The prosecution argued three different exceptions that permitted the search: search incident to Dotson and/or Crawl's arrest, the "automobile exception (a Carroll search), or "inevitable discovery of the evidence in a later inventory search." The Court elected to justify the search on the first, search incident to arrest, and thus found it unnecessary to discuss the remaining theories.

The Court noted that under the precepts of Thornton⁸⁵, "so long as either Dotson (the driver) or Crawl (the passenger) was a 'recent occupant' of the car when arrested, the search of the car was permissible. Further, the Court noted that the trial court had been "concerned that the search occurred before Crawl's

⁸⁵ Thornton v. U.S., 541 U.S. 615 (2004).

arrest, but, in this context, that timing [was] immaterial; so long as Officer Dyer had probable cause to arrest Crowl, no formal custodial arrest was necessary before a search incident to arrest could occur.”⁸⁶

Dotson’s conviction was affirmed.

SEARCH & SEIZURE - WARRANT

U.S. v. Popham

250 Fed.Appx. 170, 2007 WL 2935844 (6th Cir. 2007)

FACTS: On Sept. 12, 2004, just before sunrise, Trooper Veltman (Michigan State Police) “walked through the woods until he came to the fenced property” owned by Popham and his wife, Crane. Trooper Veltman had gotten a tip from a CI that the pair were growing marijuana. In fact, a search in 2000 had produced evidence of that, but the evidence found during that search had been suppressed.

Trooper Veltman spotted the shape of marijuana plants inside a greenhouse. He obtained a search warrant that same day. The warrant covered a mobile home located on Popham’s property, in addition to all outbuildings, vehicles, and persons at the property. The warrant also provided for the seizure of all controlled substances and firearms used in the trafficking of controlled substances. The search warrant was executed on September 14, 2007 and led to the seizure of 143 marijuana plants and several firearms, in addition to numerous possessions.

Popham was indicted on federal charges relating to the marijuana and guns found on the property. Both he and Crane requested suppression. The trial court found that the “warrant was overbroad in part but upheld the seizure of the marijuana plants and firearms.” Popham took a conditional guilty plea, and appealed.

ISSUE: Does the elimination of a substantial part of a search warrant affidavit necessarily invalidate the warrant?

HOLDING: No (see discussion)

DISCUSSION: The court noted that “[i]t is beyond question that the portion of Veltman’s affidavit that relied on a March 2000 search pursuant to a flawed warrant could not present a substantial basis for probable cause.” The trial court had also disregarded information from an unnamed informant. However, since, the trial court had already excised that from its consideration, the Court had to look at “whether the untainted portions of Veltman’s affidavit present[ed] probable cause.” The trial court had found, and Popham had conceded that “Trooper Veltman’s personal observations alone would establish probable cause to search the premises, provided that they are true and not themselves tainted by illegal action.”

Specifically, Popham questioned the apparently admitted problem with visibility that Veltman had in seeing the plants in the greenhouse. However, the appellate court found that the trial court had made a determination as to credibility, and that the trooper’s personal observations were sufficient to support probable cause.

⁸⁶ U.S. v. Montgomery, 377 F.3d 582 (6th Cir. 2004).

Popham also argued against the scope. The trial court “upheld the warrant’s description of the places to be searched, but held that portions of the warrant describing the items to be seized were flawed.” Popham argued that the inclusion of structures in addition to the greenhouse made the warrant “impermissibly broad.” Popham pointed to Maryland v. Garrison,⁸⁷ for the concept that large marijuana plants would not be found in a residence, but the Court noted that such plants suggested a business operation, and that documents, weapons and cash would likely be found “in more than one structure on the property, including the residence.” The Court stated “[i]n short, because there was probable cause to believe Popham was running a marijuana business, the scope of the search properly included the other structures within the curtilage.”

The Court agreed that the portion of the warrant that “authorized the seizure of ‘[a]ny and all ... items of value’ that were proceeds of or used to facilitate” the business was overbroad, but found that the trial court had already settled that issue by severing that portion of the warrant from the rest.⁸⁸

The court found that the “trooper’s affidavit underlying the search warrant contained untainted evidence that the affiant had personally observed marijuana” and the Court found that was sufficient probable cause to support the warrant.

Popham’s conviction was affirmed.

SEARCH & SEIZURE - STANDING

U.S. v. Stuckey

2007 WL 3037286 (6th Cir. 2007)

FACTS: Stuckey was involved in the murder of Darbins, a former Detroit police officer who had been indicted in a cocaine trafficking operation. Darbins had attempted to shoot an informant, but missed, and he was eventually charged for that attempt. On Aug. 6, 1996, Stuckey murdered Darbins, which was witnessed, and later testified to, by Felder. Felder and Murrie assisted Stuckey in wrapping the body and disposing of it in an alley, where it was found the next morning.

On Sept. 6, 2002, federal agents arrested Stuckey, who was wanted, in Lawrenceville, Georgia. Also in the apartment they found a large amount of cash and jewelry along with a marijuana roach in plain view. Agent Lockhart (DEA) applied for a search warrant, covering apartment, curtilage, and vehicles, and listed the only item to be seized was marijuana. The agents, however, also seized “a blue knapsack filled with paperwork (including the rap lyrics listed below), correspondence, [and] at least one address book,” marijuana, jewelry, a designer purse cellular phones and assorted clothing.

Stuckey was charged with numerous federal offenses. He moved for suppression of the evidence found during the search, arguing that the “discovery of a single marijuana cigarette did not suggest that other contraband was located in the apartment” and that “the search exceeded the scope of the search warrant because the warrant permitted only a search for marijuana, whereas the federal agents conducted a “Free For All” and seized other items that were not marijuana.” The Government contended that:

⁸⁷ 480 U.S. 79 (1987).

⁸⁸ See U.S. v. Blakeney, 942 F.2d 1001 (6th Cir. 1977).

- (1) Stuckey failed to establish standing to challenge the search because he had no reasonable expectation of privacy in someone else's apartment;
- (2) the search warrant was supported by probable cause;
- (3) the agents who executed the search relied in good faith on the warrant;
- (4) the evidence seized was in plain view; and
- (5) the search of the vehicle was proper under the automobile exception to the warrant requirement.

The Court ruled against suppression, finding that Stuckey did not have sufficient standing to challenge the search, and that his status as being on "supervised release" required only reasonable suspicion.

Among over evidence eventually introduced against Stuckey were "handwritten rap lyrics composed by Stuckey, which the Government argued were akin to a confession:"

I expose those who knows; Fill they bodys wit ho[l]es; Rap em up in blankit; Dump they bodys on the rode." The lyrics also repeatedly referred to killing and retaliating against "snitches.

Stuckey was convicted, and appealed.

ISSUE: Does an occasional sublessee have the same right of privacy in a location as the primary lessee?

HOLDING: No (not quite as much)

DISCUSSION: The Court found that the search was valid "because two factors, in combination, reduced Stuckey's expectation of privacy." Further, it stated that "[a]n individual may only claim the protection of the Fourth Amendment if he has a legitimate expectation of privacy in the premises being searched." "First, he was in the apartment only for a brief period, and was using it to aid in the progress of his flight from authority. Second, he lacked the degree of privacy expected by a person who is not on supervised release."

The Court agreed that Stuckey had a closer relationship to the apartment in this case was "closer to that of a motel patron or an apartment sublessee than to a business visitor" since he had paid the lessee to stay at the apartment, and also kept personal items there," and he slept there. However, his status reduced his expectation of privacy. Even though the conditions of his "supervised release conditions did not authorize the search, the fact that Stuckey was subject to supervised release itself lessened Stuckey's expectation of privacy." The Court found no reason to suppress the evidence.

With respect to the introduction of the rap lyrics, the Court agreed that they were "properly admitted as party admissions" and did not agree that they should be excluded as "irrelevant, improper evidence of prior bad acts." The Court found them relevant, since they discussed "killing snitches" in specific ways that precisely matched "what the Government accused Stuckey of doing to Darbins in this case." They were admissible as prior statements "admissible to show knowledge, preparation, plan and arguably modus operandi."

Stuckey's conviction was affirmed.

SEARCH & SEIZURE - EXIGENT ENTRY

U.S. v. Buckmaster

485 F.3d 873 (6th Cir. Ohio 2007)

FACTS: On May 14, 2004, Madison Township (Ohio) Fire Dept. was called to a fire, and found heavy smoke showing. They evacuated the building's residents, including Buckmaster, his spouse and his tenants. They found the fire burning in the bedroom and extinguished the blaze in the headboard of the waterbed. During the process, the waterbed itself ruptured. Water seeped down through the walls and the firefighters placed tarps to try to contain the damage.

Sgt. Byers, of the MTPD, was also present. He was a qualified firefighter and arson investigator and knew the department had received complaints about Buckmaster setting off fireworks. He told the fire chief, who questioned Buckmaster about it. Buckmaster admitted there were fireworks in the house, but stated that they were not close to the scene of the fire.

Sgt. Byers and Officer Perko (a firefighter and more experienced fire investigator) went to the scene to start the investigation. Since they had to wait for the water to be cleared from the room, they "decided instead to check the residence for high carbon monoxide levels and for 'other possible dangers to the structure from the fire.'" They used a hand-held meter to check throughout the house, including the basement. At one point, they found "substantial amounts of water draining through to the basement" and requested more tarps. As they entered the furnace room, they found, in plain view, large boxes marked as explosives - they were, in fact, commercial grade fireworks. Ultimately, 1,250 pounds of explosives were found. Buckmaster was charged under federal law that prohibited the possession of such fireworks without the appropriate licenses.

Buckmaster requested suppression, and was denied. He took a conditional plea, and appealed.

ISSUE: May firefighters go through a house incident to a fire and act upon what they see?

HOLDING: Yes

DISCUSSION: Buckmaster complained that the two officers "violated his Fourth Amendment rights when they opened the door to, and subsequently entered, his basement furnace room." Buckmaster relied upon Michigan v. Tyler⁸⁹ and Michigan v. Clifford⁹⁰ In support of his assertion that the entry was unlawful. He argued that since the officers were not looking for the cause of the fire at the time they found the fireworks, that the "search of the remaining portions of the house, not for fire causation evidence, but for carbon monoxide levels, was per se unreasonable."

The Court however, stated that although both Tyler and Clifford were arson cases, that the "two cases say little ... about the often more common, and more obvious, reason that fire officials may remain in a fire-damaged residence; namely, to make sure the residence is safe for its inhabitants to return to." Further, this "might require that the fire officials inspect portions of the house for electrical or structural damage; or it may require that they make sure the house is free of high carbon monoxide levels."

⁸⁹ 436 U.S. 499 (1978).

⁹⁰ 464 U.S. 287 (1984).

Madison Township pointed to “not one, but two ... specific exigencies” justifying the actions of the two officers. First, the water coursing through the walls “created a continued danger of electrical shorts.” They took appropriate action to ensure the safety of the residents, and they were not required to “obtain a warrant nor the express permission of the homeowner in order to alleviate such dangers....” In addition, MT argued that it was critical to check for high carbon monoxide levels throughout the house. However, since the “firefighters working on the first and second floors had removed their breathing devices prior to the Byers/Perko sweep - . . . it was obvious to most of those present that carbon monoxide levels were in the acceptable range.” In addition, large fans had already been placed to clear the smoke well before the pair arrived to investigate.

The Court concluded, however, that “[o]xymoronic and unfortunate as it may seem, Buckmaster appears to have been done in by a burning waterbed.” That fire, and the necessary deluge of water, justified the “local fire officials’ warrantless search of many of the rooms of the house - including the furnace room in which the explosives were found in plain view - to ensure that the water was cleaned up and no such damage had occurred.”

The Court affirmed the denial of the suppression motion, and upheld his plea.

SEARCH & SEIZURE - SEARCH WARRANTS

U.S. v. Bethal

2007 WL 2286541 (6th Cir. 2007)

FACTS: In August 2000, the Louisville PD were investigating a series of “gang-related drive-by shootings.” In one of the incidents, on July 31, members of the “Victory Park Crips” shot at a car occupied by McCurley, Moore, Burks and Williams. Two of the four were members of the “Old Southwick Bloods,” Burks and Williams were unharmed and were later arrested for “an alleged retaliatory shooting.” “Moore was injured, and McCurley, who apparently was not connected with the gang conflict, was killed.” Williams identified the men involved in the shooting as Taylor, two Parkers (related) and Bethal.

Earlier in the year, Williams and Burks were shot at, and Williams injured. Later, in 2002, “members of the Crips, including DeShawn Parker, attempted to shoot Williams and Burks” and succeeded in injuring Burks’s grandmother. Burks and Williams were known to have fired at Taylor and another man, Shobe.

The shooting that triggered this case, however, occurred when a drive-by shooting occurred in August 2000, and two houses, two cars and an innocent bystander were hit. Johnson identified the shooters as Taylor, the two Parkers, Bethal and Coffey. An assortment of shell casings, of different calibers, were found in the vicinity of the shootings.

A named informant, Wright, told officers that Williams and Burks had claimed credit for shooting Taylor and Shobe, and that the Parkers sold marijuana and kept guns and drugs at their grandmother’s house. She also told them that on July 31, one of the Parkers had told her that he was going to “‘get’ Williams and Burks that night.” He later expressed dismay at having been unsuccessful. One of the Parkers had offered the informant money to “set up” the pair, so he could arrange their murder.

On Oct. 5, 2000, Detective Tarter (Louisville PD) “prepared an affidavit detailing these and other facts gleaned from the investigation of the various shootings, in support of a search warrant for Bethal’s residence.” At trial, the prosecution conceded “that the affidavit, which was eight pages in length, was used to obtain search warrants for multiple residences, not just Bethal’s.” Specific to Bethal, the affidavit stated that “(1) a witness claimed Bethal was among the shooters in the incident wherein LaKnogany McCurley was killed, (2) another witness maintained that Bethal was with the shooters in an incident occurring on Cedar Street, (3) a statement from detective Tarter that he was given a list of gang members containing Bethal’s name, and (4) Bethal’s current address.” Also in the affidavit, there was information linking guns and drugs to another residence, one occupied by the Parkers, but included no such statement linking contraband to Bethal’s residence.

The warrant was signed, authorizing police to search for handguns and ammunition, along with “all contraband, other drugs, and evidence of gang affiliation.” They found only crack cocaine and almost \$3,500 in cash. Bethal was indicted on possession and federal distribution charges related to the drugs. He requested suppression, arguing that the warrant was insufficient. The District Court granted the motion because it “failed to ‘establish the requisite nexus’ between the place to be searched and the evidence sought” and further, that the good faith exception did not save the evidence because “a ‘reasonably well trained officer’ would not have believed that the ‘bare bones’ affidavit established probable cause.” The United States appealed.

ISSUE: Must a warrant contain a clear link between the items to be sought and the location to be searched?

HOLDING: Yes

DISCUSSION: The Court stated by noting that “[i]n order to establish probable cause to search, a warrant request must ‘state a nexus between the place to be search and the evidence sought.’”⁹¹ The Court is expected to consider “whether the totality of the circumstances supports a finding of probable cause.” Looking at the affidavit, the Court found that “a place may not be searched merely because a criminal suspect resides there.” The Court reviewed a number of earlier cases on the issue – all of which suggested that the fact that a property owner is suspected of a crime is insufficient to “create probable cause” in itself.⁹²

The Court noted that “[i]n this case, the affidavit only contained information connecting [Bethal] to two shootings; it did not include any facts connecting him to drugs or to weapons at his home other than his alleged status as a gang member and known acquaintance of the Parkers who reportedly kept drugs and guns in their residence” elsewhere. The Court agreed that the “affidavit did not provide a sufficient factual basis from which a magistrate could draw a reasonable inference that Bethal kept drugs or weapons at his home” although the information available did provide sufficient information for an arrest warrant for Bethal.

The Court noted that although “suspects identified as drug dealers routinely keep drugs at home,” “persons accused of murders often dispose of the guns utilized in the crime soon afterward.” The Court stated that the affidavit “provided no indication that at the time of the search, Bethal was still participating in gang-related shootings, or was seen carrying a gun.” As such, “[b]ecause the affidavit fails to establish any

⁹¹ U.S. v. Van Shutter, 163 F.3d 331 (6th Cir. 1998).

⁹² See, specifically, U.S. v. Frazier, 423 F.3d 526 (6th Cir. 2005) and U.S. v. McPhearson, 469 F.3d 518 (6th Cir. 2006).

relationship between Bethal's residence and the fair probability that weapons and drugs would be found there, no probable cause existed to support the issuance of the search warrant as to these items."

Moving to the good faith argument, the Court stated that this "exception to the exclusionary rule permits the admission of evidence obtained from the execution of an invalid search warrant except:

(1) when the warrant is issued on the basis of an affidavit that the affiant knows (or is reckless in not knowing) contains false information; (2) when the issuing magistrate abandons his neutral and detached role and serves as a rubber stamp for police activities; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; [or] (4) when the warrant is so facially deficient that it cannot reasonably be presumed to be valid.⁹³

The District Court had considered this to be an instance of a "bare bones affidavit" – or one that "merely 'states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.'"⁹⁴ This affidavit "failed to contain a minimally sufficient nexus between the illegal activity (drive-by shootings) and Bethal's home" and that "[i]n fact, it established no connection whatsoever."

The Court did elect to address the issue of the search warrant for "gang indicia" which Bethal claimed was unlawful, as gang membership, in itself, is not illegal. The Court however, noted that other circuits had upheld such searches, when the authorization specifically details the types of items sought. This warrant, however, did not provide such necessary details and, as such, was invalid.

Bethel further argued that the affidavit "contained recklessly false information because Detective Tarter, the affiant, did not 'verify these tipsters who identified him' as involved in some of the shootings."⁹⁵ The Court found that although there were some discrepancies in statements made by some of the witnesses, that there was no indication that Tarter's statements in the affidavit were made with reckless disregard of the truth.

The Court affirmed the suppression of the evidence.

U.S. v. Robbins

2007 WL 1875079 (6th Cir. Ohio 2007)

FACTS: In early 2005, Toledo drug task force police officers became aware that "Robbins was selling drugs out of his home." Detective Awls requested a search warrant, based upon a search warrant that detailed the information the officers had concerning Robbins' operation. That information included a great deal of information from a CI, and included a request to do a night search.⁹⁶ However, the search took place in an afternoon, and the officers found both powder and crack cocaine, marijuana, paraphernalia, guns and currency. As a result of the search, Robbins was indicted on multiple federal drug-related counts.

⁹³ U.S. v. Laughton, 409 F.3d 744 (6th Cir. 2005) citing U.S. v. Leon, 468 U.S. 897 (1984).

⁹⁴ U.S. v. Weaver, 99 F.3d 1372 (6th Cir. 1996).

⁹⁵ Franks v. Delaware, 438 U.S. 154 (1978).

⁹⁶ Apparently a requirement under Ohio state law.

Robbins moved to suppress, arguing that the search warrant lacked sufficient probable cause, that the magistrate had stale information and that the warrant was not executed in a timely manner.

Upon being denied, Robbins took a conditional plea, and appealed.

ISSUE: May a warrant be founded upon a CI's reliable hearsay evidence?

HOLDING: Yes

DISCUSSION: First, Robbins argued that the warrant was not supported by probable cause. The Court noted that an affidavit "need not reflect the direct personal observations of a law enforcement official and may be based on a confidential informant's hearsay, so long as the issuing judicial officer is reasonably assured that the informant was credible and the information reliable."⁹⁷ The information shared by Detective Awls was sufficient to convince a judge of the CI's credibility, since Detective Awls made it clear that he knew the identity of the CI and has worked with him, successfully, in the past. Independent corroboration was only necessary when the CI is not adequately shown to be reliable and believable.

Next, Robbins argued that the officers did not follow the dictates of the warrant, in that they searched in the afternoon rather than at night. However, due to a defect in the way he argued the point, the Court found that the warrant was executed timely, within the three day window permitted, even though it took place in the afternoon rather than at night.

After disposing of unrelated issues, the Court upheld his plea agreement.

U.S. v. Head

216 Fed.Appx. 543, 2007 WL 414276, 2007 Fed.App. 0098N (6th Cir. Ohio 2007)

FACTS: In January, 2004, the Akron PD were told by a CI that Head was selling crack from his residence, and the CI subsequently made several controlled buys. On March 29, a search warrant was issued, based upon an affidavit that a controlled buy had been made within the previous three days. The affidavit, read, in part:

On March 30, "officers in unmarked police cars set up surveillance on [the residence] in order to execute the search warrant." Since Head's car was in the driveway, they believed him to be at the house. Just before they expected to execute the warrant, Head "unexpectedly left in a Jeep Cherokee." Since the agency's policy was that stops were not made in unmarked cars, they tried to get a marked vehicle to stop him. However, one was not available, so the officers in the unmarked cars followed him. When he stopped at a gas station, about a mile from the house, the officers decided they could effect the stop safely, and they approached and handcuffed him. He was brought back to his house so that the officers could execute the warrant, and he was permitted to secure his dogs. The search yielded a firearm, money, cell phones and a substantial amount (29 grams) crack cocaine.

During the stop, the officers gave Head his Miranda warnings, and he waived them. He told them he had forgotten about the gun – he had denied having any weapons in the house earlier. He agreed his

⁹⁷ U.S. v. Williams, 224 F.3d 530 (6th Cir. 2000).

fingerprints were probably on the gun. He further incriminated himself by arguing that the crack cocaine was “small time.”

Head was indicted, and he argued for suppression concerning his statements. The motion was denied, and eventually, he was convicted on several of the charges. Head appealed.

ISSUE: May officers stop an individual who is leaving a house for which they have a search warrant, and hold that individual during the execution of the warrant?

HOLDING: Yes

DISCUSSION: First, Head argued that the officers did not have the authority to go after him and bring him back to the residence during the search. He attempted to distinguish his situation from Michigan v. Summers,⁹⁸ arguing that because he was a distance from the house, and “no longer on the ‘premises,’ the stop was improper. The Court noted, however, that the Summers holding had been extended in U.S. v. Cochran,⁹⁹ which permitted the police to follow an individual from a house for which a search warrant was being executed and bring him back to the house. In that case, the court found that the focus was not on “geographic proximity” but was on whether the individual was detained as soon as practicable after departure.

In this case, the court agreed that he was stopped as soon as he could be safely detained and held that the stop was not a violation of Head’s Fourth Amendment rights. His conviction was affirmed.

U.S. v. Miller/Ramsey
2007 WL 930425 (6th Cir. Tenn. 2007)

FACTS: On November 27, 2002, Deputy Wilson (Monroe County TN SD) “obtained a search warrant from a state court judge for the residence of Ernest and Mary Miller, who lived on property owned by Ernest and his mother.” The affidavit stated that the pair had pleaded guilty the previous week to criminal drug charges, apparently as a result of the discovery of drugs found at the home the previous year. The affidavit further stated that a CI had seen methamphetamine and firearms inside the home in September, and that Ernest had spoken of manufacturing methamphetamine, and that within 72 hours prior to Nov. 27, the CI had again seen methamphetamine along with the items needed to create a lab. In addition, Ernest had spoken of having explosives on the property. The CI had proven to be credible in the past, Wilson stated.

In the early evening of Nov. 27, sheriff’s deputies executed the warrant, and found the Millers, Mary’s daughter Samantha Moreno and Phyllis Ellison. While searching Ernest, they found methamphetamine, ammunition and over \$900 in cash. They found many items used in manufacturing meth in the home, along with long guns and handguns and a vast amount of ammunition. In Mary’s purse they found a shopping list and receipts indicating the purchase of a number of items needed to manufacture methamphetamine. The receipt suggested that Samantha may have actually made the purchases.

⁹⁸ 452 U.S. 692 (1981).

⁹⁹ 939 F.2d 337 (6th Cir. 1991).

Deputy Vittatoe, assigned to secure the rear of the home, spotted Ramsey, who he recognized, "come out of a shed located behind the trailer." When Vittatoe challenged him, Ramsey ran, and was able to evade capture. Vittatoe returned to look inside the shed, and saw a working lab. Because of the strong fumes, the officers waited to don appropriate protective gear, and then entered.

The Millers, Moreno, Ramsey and another individual who arrived during the search, Bivens, were all indicted on a variety of charges related to methamphetamine manufacturing. They appealed.

ISSUE: Is a shed generally included in a search warrant for the residence?

HOLDING: Yes

DISCUSSION: First, Ernest Miller argued that the search warrant "did not identify the items to be seized with sufficient specificity and that the officers' search of the shed behind the trailer exceeded the warrant's scope." The Court, however, agreed with the trial court that the search was valid, because the shed was within the breadth of the search warrant and because Miller did not have standing to complain.

Miller also argued that the "supporting affidavit failed to establish that the CI was reliable and that his information was current. He had requested the identity of the CI, but was refused by the trial court. The Sixth Circuit agreed that he had not made the necessary showing that the CI's identity was essential for a fair trial, and that the trial court's decision was correct."¹⁰⁰

U.S. v. Rice
478 F.3d 704 (6th Cir. Ky. 2007)

FACTS: As a result of an ongoing investigation involved the FBI, FBI Agent Wenther sought a wiretap order. That wiretap resulted in evidence that led to indictments against Rice and others. Rice, then sought to suppress the information gained as a result of the wiretap, and the District Court agreed, further agreeing that there was no good faith exception that could save the evidence. The prosecution appealed.

ISSUE: Is a warrant that is materially deficient able to be "saved" by the good-faith exception?

HOLDING: No

DISCUSSION: First, the Court discussed the Wenther affidavit and summarized it, as follows:

All normal avenues of investigation have been carefully evaluated for use or have been attempted with minimal results. The traditional investigative techniques utilized thus far have included the use of confidential sources (against known members of the Shawn B[ullitt] organization), obtaining toll records for other phone lines and for the target telephone, and physical surveillance. Also closely considered, but not deemed likely to success for reasons set forth below, include the use of undercover agents, use of a Federal Grand Jury, the serving of search warrants, interviews of subjects or associates, and the use of "trash pulls."

¹⁰⁰ Roviaro v. U.S., 353 U.S. 53 (1957); U.S. v. Moore, 954 F.2d 379 (6th Cir. 1992).

The Court reviewed whether the officers actually did the actions claimed, or suggested, by the affidavit. The trial court found that the issuing judge “would mistakenly think that agents had conducted physical surveillance” when in fact, there was no evidence that they had done so. Wenthert testified, at the hearing, that “they had no specific information on whether Rice carried a firearm.”

In another part of the affidavit, Wenthert claimed that a confidential informant was not available, or alternatively, was unable, to gain any information about the organization, but in fact, it appeared that the government failed to take “any steps to develop such a source.” Further, the “district court found inadequate the generic information included regarding how drug traffickers normally operate” rather than how Rice specifically operated.

With regards to the use of pen register and telephone toll analysis, the Court noted that the affidavit “mainly focused on ‘general language about the usefulness of pen registers in general.’” It did note that the pen register identified that Rice had been in contact with other individuals linked to drug trafficking. The other techniques mentioned, which were not attempted, all “suffer[ed] from the same problem” - they addressed the problems in general rather than how they were not possible or useful in this particular case.

The District Court had found that the warrant, particularly the statement about physical surveillance, were made so recklessly that “it could not afford the same deference ordinarily due to an issuing judge’s determination.” The District Court also noted that “[o]ther than some uncorroborated thoughts and opinions there is no evidence that any other investigative technique was ever used or even seriously considered.” In addition, the Court “found that the government was using the wiretap in a forbidden manner - as the first step in its investigation against Rice.”

Finally, the Court concluded that the affidavit, once “reformed for its factual deficiencies” was not able to meet the minimum requirements for a valid warrant, and upheld the District Court’s suppression of the evidence.

The Court also reviewed whether the warrant was valid under the good-faith exception laid out by U.S. v. Leon.¹⁰¹ It concluded that Leon does not apply to warrants that are improperly issued under Title III - the wiretap provisions.¹⁰² The relevant federal statute provides that exclusion of the evidence is the appropriate legal remedy for an improperly-issued warrant. “The statute is clear on its face and does not provide for any exception” and as such “[c]ourts must suppress illegally obtained wire communications.”

The decision of the trial court, to suppress the “fruits of the wiretap” was affirmed.

SEARCH & SEIZURE - CONSENT

U.S. v. Lord

230 Fed.Appx. 511 (6th Cir. Tenn. 2007)

FACTS: On Feb. 23, 2004, Agent Allen (ATF) was contacted by a “concerned citizen” concerning that individual’s belief that “Lord, a convicted felon, was in possession of a firearm.” On June 8, 2004, Agents Allen and Weeks went to Lord’s home and “represented to Lord that they were real estate investors

¹⁰¹ 468 U.S. 897 (1984).

¹⁰² See 18 U.S.C. §1983.

interested in purchasing his house." Lord agreed to let them inside and they "engaged in a visual inspection of the interior, including Lord's bedroom closet." Seeing a "soft long-gun case," Agent Weaks "grabbed the case, and identified what felt like a shotgun or rifle."

On July 15, Agent Allen requested a search warrant. The affidavit, in relevant part, stated as follows:

On February 23, 2004, I received information from a concerned citizen regarding Robert Lord illegally possessing firearms. The concerned citizen stated Robert Lord was a convicted felon who possessed a shotgun and a pistol. I received pictures via email from the concerned citizen displaying Lord possessing a shotgun and a revolver. I later determined through NCIC that Robert Lord was convicted of a felony in 1992.

On June 8, 2004, ATF agent Brian Weaks and I, in an undercover capacity, went to Robert Lord's residence. Agent Weaks and I posed as real estate investors since Lord's residence was for sale. Agent Weaks and I were invited inside the residence by Lord. Once inside the residence, Agent Weaks observed a soft long-gun case in Lord's master bedroom closet. Agent Weaks grabbed and squeezed the soft case and felt a hard object that appeared to be a rifle or a shotgun. On July 6, 2004, ATF agent Gray Lane and I interviewed the concerned citizen regarding the previous information given to me concerning Robert Lord. I was informed by the concerned citizen that he observed guns either in Lord's truck or house on at least four occasions. I was informed by the concerned citizen that Lord tried to persuade the concerned citizen to buy a small pistol for him (Lord) because Lord stated that he could not purchase a firearm due to his federal criminal record.

Agent Allen received his search warrant, and it was executed the next day. The agents discovered a shotgun and a revolver. Lord waived his rights and confessed at the scene.

Lord was indicted on two counts of illegal possession of the firearms. He requested suppression, arguing that the search was unlawful. The District Court ruled that Lord had "consented to the officers' entry, and the agents' deception concerning their identities did not negate that consent." Further the Court held that "Weak's probing of the gun case did not constitute a prohibited search."

Lord took a conditional guilty plea, and appealed.

ISSUE: Does a consent to search a location automatically carry consent to handle storage containers?

HOLDING: No

DISCUSSION: The Court quickly agreed that "Lord allowed Agents Allen and Weaks into his home," and found no reason to disagree that "Lord consented to the inspection of his bedroom closet." Even though the "agents secured entry by misrepresenting their identities, their deceit does not negate Lord's consent to entry."¹⁰³

¹⁰³ U.S. v. Pollard, 215 F.3d 643(6th Cir. 2000) ; U.S. v. Baldwin, 621 F.2d 251 (6th Cir. 1980).

Next, the Court discussed the investigation of the gun case. The Court noted that it had found in the past that “in ascertaining the scope of a consent to search,” it considered what “the typical reasonable person [would] have understood by the exchange between the officer and the suspect.”¹⁰⁴ As such, it rejected the contention that Lord’s consent for the agents to look into the closet would extend to “the handling of closed storage containers in the closet.” Although the prosecution argued good faith to justify the search, assuming that it was, in fact, improper, the Court found that the “independent source doctrine [was] a more appropriate basis” on which to argue the legality of the search. Under that doctrine, the “presence of unlawfully secured information in a search warrant affidavit does not necessarily make a subsequently obtained warrant invalid,” if the Court found that there was sufficient information to support the affidavit after purging it of the tainted information.

In evaluating probable cause, the Court was required to consider “whether there were reasonable grounds to believe at the time of the affidavit that the law was being violated on the premises to be searched.”¹⁰⁵ With regards to the “concerned citizen,” the Court looked for the “recognized indicia of informant reliability” which would include “a detailed description of what the informant observed first-hand, or the willingness of the informant to reveal his or her name.”¹⁰⁶ When that information is weak in the affidavit, the Court would then look for evidence that the “police confirmed the information provided by such an informant.” Although the affidavit did little to support the reliability of the citizen, it did not indicate the individual’s name or provide any information that would support the belief the individual was truthful and reliable, the Court found that “the individual spoke with law enforcement agents on at least two occasions and provided detailed accounts of Lord’s unlawful possession of a firearm” and provided the agent with a photo of Lord possessing a firearm. The informant’s information was further supported by Weaks’ observation of a gun case in the closet, even though, of course, it would be impossible to know that a gun was actually inside.

The Court concluded “that there was adequate information in the affidavit, stripped of any reference to material gleaned from Agent Weak’s unlawful handling of the gun case,” to sustain the affidavit and to support probable cause for the search. Lord’s plea was affirmed.

U.S. v. Howard

216 Fed.Appx. 463, 2007 WL 177890, 2007 Fed.App. 0057N (6th Cir. Ky. 2007)

FACTS: On Sept. 5, 2001, KSP received information from Agent Brock, (BATF) that he had information that Howard, a convicted felon, “was shooting a gun in his backyard.” KSP troopers went to the house but found that Howard was not home. They asked Howard’s wife if there was a gun in the house, to which she replied no, and she permitted them to search the house. They found a .22 rifle in the closet, and Mrs. Howard admitted that she, her husband, and another individual had fired the rifle. The rifle was seized at that time.

On Sept. 14, 2001, Agent Brock, and others, returned to the house and searched again, finding ammunition but apparently no guns. Brock interviewed Howard, and Howard admitted having fired a shotgun, but not the rifle that was found.

¹⁰⁴ U.S. v. Garrido-Santana, 360 F.3d 565 (6th Cir. 2004).

¹⁰⁵ Mays v. City of Dayton, 134 F. 3d 809 (6th Cir. 1998).

¹⁰⁶ U.S. v. McCraven, 401 F.3d 683 (6th Cir. 2005).

Eventually, both of the Howards were charged with being felons in possession, and Mrs. Howard pled guilty and agreed to testify. Howard attempted to get the rifle and the ammunition suppressed, with no success.

Howard was convicted, and appealed.

ISSUE: Must officers actively seek permission from an absent spouse in order to search a residence, when consent has been obtained from the spouse that is present?

HOLDING: No

DISCUSSION: Howard first argued that the consent given by his wife for the first search, the one that produced the rifle, was invalid because she was intoxicated (on drugs) at the time. The Court found no reason, however, to invalidate her consent and suppress the rifle.

Further, the Court did not find it necessary to suppress the consent under Georgia v. Randolph, in that the case “does not require the police specifically to determine whether [Howard] was present in the home before conducting the search after they obtained Lila Howard’s consent.”¹⁰⁷

The Court also held that although the search warrant affidavit did not “go into great detail about the confidential source’s past reliability” that it did provide sufficient corroboration to support the CI’s information. The Court agreed with the trial court that the warrant was adequately supported by probable cause.

Finally, the Court found that a statement made by Howard to Agent Brock, who had gone to the jail where Howard was being held to collect fingerprints and photos, was spontaneous and voluntary, and thus admissible.

After addressing a number of other procedural issues, Howard’s conviction was affirmed.

Pratt v. U.S.

214 Fed.Appx. 532, 2007 WL 186496, 2007 Fed.App. 0050N (6th Cir. Ohio, 2007)

FACTS: On Sept. 24, 2003, a number of officers when to Pratt’s mother’s home to find and arrest Pratt. “Pratt lived with his mother in the upper flat of a duplex she owned” and he “did not pay rent for the single bedroom he occupied.”

Pratt’s mother stated she was the sole leaseholder (in fact, she was the owner) and that Pratt “stayed there.” She told the officers Pratt was not there, but she signed a consent form permitting a search of the premises.

In the course of the search, the officers “came upon Pratt’s locked bedroom door.” Pratt’s mother later testified that she had free access to the room, and there was dispute as to whether she provided a key, but somehow, the agents gained access. They found a gun and ammunition. Because Pratt was a felon, he was subsequently charged for possession of the gun. Pratt moved for suppression, arguing his mother did not have authority over his bedroom, but the District Court denied the motion. Pratt appealed.

¹⁰⁷ 126 S.Ct. 1515 (2006).

ISSUE: May a parent give consent to search an adult child's locked bedroom?

HOLDING: Yes

DISCUSSION: The court noted that a "warrantless search does not violate the Fourth Amendment when a person who possesses common authority over the premises with the suspect consents to the search."¹⁰⁸ "Typically, all family members have common authority over all of the rooms in the family residence,"¹⁰⁹ but that may be refused by proof that one family member has "clearly manifested an expectation of exclusivity" over an area. However, the Court agreed that "[m]ere possession or non-possession of a key at the time of a search is not dispositive in determining whether a co-occupant has common authority over an enclosed space."¹¹⁰

The Court found that because Pratt's mother owned the residence and admitted she had access, and because "Pratt did not even contribute rent," that Pratt's mother had actual authority to consent to the search. (And even if she did not, she clearly had apparent authority to do so.

Pratt's conviction was affirmed.

U.S. v. Grayer
232 Fed.Appx. 446 (6th Cir. Tenn. 2007)

FACTS: On Nov. 25, 2003, Officer Cunningham (unnamed Tennessee agency) stopped a vehicle for driving without headlights. He learned that the vehicle had been reported stolen. The driver, Faulkner, indicated he had borrowed the car from Grayer, who lived within just a few doors of the stop. Cunningham cuffed Faulker, secured him in the cruiser and searched the car, finding ammunition in the trunk - a box of .40 caliber bullets with ten rounds missing.

When additional officers arrived, Officer Cunningham and another went to Grayer's door, with other officers nearby. A man who identified himself as Grayer answered the door, and Cunningham asked him to step outside. When he acknowledged ownership of the vehicle, he was arrested, searched and placed in the cruiser.

The officers went back to the house and sought entry from the woman who answered the door, Clay. Officer Cunningham recognized Clay as the caretaker of the home, as the homeowner was away in prison, and she signed a written consent form permitting the officers the search the house. Upon being asked about weapons, Clay "hesitantly took the officers" to a location in the house and pointed out a .40 caliber handgun.

Grayer was advised of his Miranda rights and questioned. He admitted to possession the vehicle, the ammunition and the pistol. Faulker was released, but Grayer was arrested. Grayer requested suppression, was denied, and he took a conditional guilty plea. Grayer then appealed.

¹⁰⁸ U.S. v. Matlock, 415 U.S. 164 (1974).

¹⁰⁹ U.S. v. Clutter, 914 F.2d 775 (6th Cir. 1990).

¹¹⁰ Illinois v. Rodriguez, 497 U.S. 177 (1990); U.S. v. Gillis, 358 F.3d 386 (6th Cir. 2004).

ISSUE: May a caretaker consent to the search of an entire residence?

HOLDING: Yes

DISCUSSION: First, Grayer argued that Clay lacked authority to consent to the search of the bedroom where the pistol was found, and that the officers, "when confronted with an 'ambiguous situation,'" are required to inquire further. The Court, however, found the situation was not ambiguous but that Clay had clear authority to give consent. There was no indication that Grayer had exclusive control over the bedroom which was apparently unlocked, in fact, apparently Clay claimed to occupy it and the room contained her personal belongings.

Grayer also argued that the officers "constructively entered" the house when they forced him from his home. The court, however, noted that nothing prevents officers from talking to residents and asking them to come outside, as long as the request is noncoercive. The Court found that "none of the hallmarks of constructive entry were present: (1) drawn weapons; (2) raised voices; (3) coercive demands; or (4) a large number of officers in plain sight." Only two officers went to the door and asked him to step outside. The Court found that argument must fail.

Next, the Court noted that "no level of suspicion was required before the officers approached the resident and questioned Grayer, or whomever happened to answer the door." Further, officers may initiate a "purely consensual encounter" ... without an objective level of suspicion. The Court found "these so called "knock and talk" consensual encounters as a legitimate investigative procedures so long as the encounter does not evolve into a constructive entry." As such, the initial approach was appropriate, and once Grayer admitted that he possessed the stolen vehicle, the officers had sufficient probable cause to arrest.

The Court upheld Grayer's plea.

SEARCH & SEIZURE - SEARCH INCIDENT TO ARREST

U.S. v. Lengen

2007 WL 1748159 (6th Cir. Ohio 2007)

FACTS: Cleveland officers had Langford and Lengen under surveillance for drug dealing, and they had two warrants on Langford. They observed Langford and Lengen leaving Lengen's home together, in a vehicle.

Officers made a traffic stop when Lengen ran a stop sign. They asked Langford to step out, and spotted a bag of marijuana on the floor. They had Lengen get out and patted him down. They also found a loaded gun under the driver's seat, and found a scale and a baggie of cocaine on Langford.

Detective Graves obtained a search warrant. During service, the officers found weapons, methamphetamine, cocaine, marijuana and packaging materials. They also found \$25,000 in cash. During the search, Lengen was seated first in the kitchen, handcuffed. He asked to be moved to a specific chair in the living room, and when they checked that area, the officers found a loaded, small caliber handgun on the floor.

Lengen was indicted and charged. He argued for suppression and also for the identity of the confidential informant. He was convicted and appealed.

ISSUE: May the entire passenger compartment be searched pursuant to the arrest of a passenger?

HOLDING: Yes

DISCUSSION: First, Lengen argued that the initial stop and search were unlawful. The Court found that the traffic violation was a perfectly appropriate reason to make the traffic stop, and noted that one of the officers had testified that Lengen pled no contest to the violation and paid a fine.

Next, the Court found that the officers were entitled to arrest Langford on the outstanding warrants. When they found the marijuana, it was further appropriate to arrest Lengen, as the driver. Next, with the arrests, the officers were entitled to search the entirety of the passenger compartment. Lengen contended that he could not be arrested because "he could not be tied to any illegality other than the minor traffic violation." (Langord "admitted ownership of all the drugs and drug paraphernalia discovered at the time of the stop.") With regards to the weapon, for which he was charged, Lengen stated the weapon was not concealed, but the officers had testified that the weapon was found "underneath the driver's seat."

The Court found the stop and the arrest to be lawful.

Next, Lengen argued that the "affidavit failed to establish a connection between the alleged criminal activity and the residence to be searched." The Court noted, though, that the traffic stop corroborated the CI's statement that Lengen kept a loaded gun under the driver's seat," and that finding marijuana and cocaine on Lengen's passenger corroborated the CI's statement that Lengen had marijuana and cocaine at the house. The Court concluded "that the reliable information about the defendant offered by the informant, in conjunction with the observations of the police and the evidence seized as a result of a legal traffic stop, provided the probable cause necessary"

Finally, he argued that the warrant did not satisfy the "particularity requirements." However, the Court noted that the warrant described the real property in sufficient detail, but that it "also sufficiently detailed the items the police could seize." In addition, the Court quickly discounted Lengen's claim that the search warrant for the residence did not extend to the safe within his bedroom closet, finding that it was appropriate to look anywhere the contraband could be hidden.

The Court also agreed it was proper to refuse to disclose the identity of the confidential informant. Since "no actual drug transaction occurred between [Lengen] and the confidential informant," and because the officers independently verified the information provided by the CI, the CI was not essential to determining Lengen's guilt.¹¹¹

Lengen's convictions were affirmed.

¹¹¹ See KRE 508.

U.S. v. Black

240 Fed.Appx. 95, 2007 WL 2426487 (6th Cir. 2007)

FACTS: On Sept. 16, 2004, Officers Ragland and Offenbacher (Knoxville, TN, PD) were patrolling in a “high crime area.” As they drove through a public park, they “noticed a car with its driver’s side door open parked on a public road in a parking spot cut out from the road.” Ragland, who was driving, stopped behind the car and turned on his high beams and saw someone moving in the back seat, like they were hiding something. Ragland later testified that he also believed the car was parked illegally because the park was closed.

The two officers approached the car on foot and spoke to Black, the driver. Ragland “noticed a tremendous odor of alcoholic beverage coming from inside of the car.” Black said that he and his passenger, his girlfriend, had been arguing and were there to cool off.

As Black reached for the ignition, Ragland asked both of the occupants for their OL. He checked both, and quickly learned that Black’s license was suspended. Ragland continued questioning the pair, and finding their “answers to be unsatisfactory,” he got Black out of the car for some “one-on-one” questioning. He patted Black down, finding nothing.

Finally, Black admitted that his real reason for being in the park was to have sex with his girlfriend. Ragland asked for consent to search, and “Black’s girlfriend interjected, ‘do you have probable cause.’” Offenbacher then got the girlfriend out to talk to her.

After further discussion, Ragland later testified, “based on their time working together,” Offenbacher knew that Ragland was going to arrest Black. Offenbacher began searching the car and found a handgun in the passenger compartment. Both of the occupants were handcuffed, and Black was secured in the cruiser.

The next day, ATF agents interviewed Black. He told the agents that he had gotten the gun from a friend, and had handled it, so his fingerprints were on the gun. He was eventually charged and indicted with being a felon in possession. He moved to suppress both the guns and his statement, both of which were denied. Black took a conditional plea, and appealed.

ISSUE: May a search incident to arrest precede the formal arrest?

HOLDING: Yes

DISCUSSION: Black first argued that he was seized, unconstitutionally, when Ragland took his OL back to the cruiser. The Court agreed that when an officer takes a driver’s OL and walks away with it, “no reasonable motorist would feel free to drive away, as this would require the motorist to either drive without a license or abandon his or her car.”¹¹²

The court found, however, that there “were several facts, that, when viewed in their totality, gave rise to reasonable suspicion.” The strong odor of alcohol, combined with evidence that Black was the driver, indicated that he might be violating the law. Combined with the vehicle’s location and the time of night, Ragland’s suspicion was justified. Further, the Court agreed that it was appropriate for Ragland to check

¹¹² Florida v. Royer, 460 U.S. 491 (1983).

the status of Black's OL, especially when being done during a lawful detention "because he was under investigation for driving under the influence."

Next, the Court found that Offenbacher's search of the vehicle was justified on two separate grounds – both as search incident to arrest and under the "automobile exception" – a Carroll search. The Court agreed that the "search may precede a 'formal arrest' so long as the officers had probable cause to arrest prior to the search and the arrest 'followed quickly on the heels of the challenged search.'"¹¹³ At the time of the search, the officers already had sufficient probable cause to make an arrest. Alternatively, it was justified as a Carroll search, as "Ragland had already smelled alcohol in the car and Black had retrieved an unsealed bottle of alcohol (cognac) from the car." In either case, Offenbacher's search was justified.

Finally, Black argued that he had not received Miranda warnings when being questioned by the ATF agents. However, both agents that he had, in fact, been given his Miranda rights, and had refused to sign a form, but had stated that he "was willing to talk to the agents."

The denial of Black's motions to suppress was upheld, and his conviction affirmed.

SEARCH & SEIZURE – CARROLL

U.S. v. Smith 510 F.3d 641 (6th Cir. 2007)

FACTS: On March 18, 2005, two "suspicious packages" arrived at a UPS facility in Romulus, Michigan. UPS contacted the DEA, which obtained a search warrant and opened the packages, finding about three kilos of cocaine. UPS made the delivery, and Green was arrested. Green agreed to cooperate with the subsequent investigation, and contacted Wilson, for whom the packages were ultimately intended. The officers found two cell phones in Wilson's possession, and Smith's telephone number was found in the address book. On March 18 and 19, 11 phone calls were exchanged between the two telephone numbers.

The DEA and Michigan authorities began an investigation of Smith. A drug trafficking suspect told investigators that Wilson was the source of Smith's drug supply, and that that Smith possessed over \$30,000 in stolen cash, guns and clothing. Another defendant told the investigators that Smith was a major distributor, that he had seen Smith in possession of a kilo of cocaine and he identified one of his dealers by name. Yet another informant, Farmer, told about multiple vehicles that Smith had purchased, for cash, and explained that he lived with a named female and had "numerous weapons." He also stated that Smith did not have a job. The DEA confirmed that Smith had three vehicles, as had been described, registered to him, that none had outstanding liens, and that he lived in the identified location. (He subsequently moved to the address at issue.)

Detective Smith, of the Michigan drug task force working with the DEA, was able to set up a CI to make purchases from Smith's organization. The CI delivered purchase money to Smith's home, although he was not at the house at the time. The drugs were picked up at another location, however. Another transaction also took place at that third location, and although the CI did not see Smith, he did see one of his vehicles. On a third trip, the CI expected to see Smith, but was told that Smith had left, as he suspected he was under investigation. A final transaction took place at a street location. The investigators doing surveillance

¹¹³ Rawlings v. Ky., 448 U.S. 98 (1980); U.S. v. Montgomery, 377 F.3d 582 (6th Cir. 2004).

could not see the driver of the suspect vehicle, although it was one of Smith's vehicles, but the CI stated that Smith directly sold him the cocaine from that vehicle.

On October 25, 2005, one of the state detectives "received an anonymous tip informing him that Smith had received a large shipment of cocaine" and had it at his home address, on Albert. The detective was provided with the description and plate number of a fourth vehicle, also determined to be registered to Smith, and found it at the stated location. On October 27, Detective Lewkowski got a search warrant for the home, and discussed the execution of that warrant with the DEA, particularly as regards what they would seize in forfeiture. In particular, they agreed to seize all vehicles registered to Smith.

In the search warrant affidavit, Detective Lewkowski detailed the facts, as above. The warrant authorized the search of the Albert residence and all vehicles on the premises. They found three vehicles on the premises at the time of the search. When they executed the warrant, officers found over \$17,000 in cash, but not the marked money that had been exchanged during the last transaction. The money was found hidden around the residence in odd places. Plastic baggies were found to contain cocaine residue, and three "semiautomatic guns were found in the residence, as well as a Taser device, expensive jewelry, and valuable electronic equipment." Some of these items were seized for later forfeiture.

Just prior to the execution of the warrant, one of the vehicle, a green Pontiac, was moved to the street. The keys and the registration had both been found in the house, and the officers searched that vehicle, finding a large quantity of cocaine, both powder and crack, a hand mixer and digital scales. One of the scales had Smith's prints. "Lewkowski testified that the WEMET has a policy regarding the inventorying of vehicles that are seized for forfeiture: officers must complete a form describing any property found in the vehicle that is not attached to the vehicle."

Smith was indicted on both drug and weapons charges. He moved for suppression of the evidence seized from the residence and the car, and of statements he made during the interrogation. The trial court denied the suppression finding first that the warrant was valid, and also that even though the vehicle, since it was not on the premises was not covered by the warrant, was validly searched "pursuant to both the automobile exception and the inventory exception to the warrant requirement."

Smith was convicted, and appealed.

ISSUE: May officers search a vehicle without a warrant, but with probable cause?

HOLDING: Yes

DISCUSSION: The Court reviewed the decision of the trial court. First, the Court reviewed the requirements for a valid vehicle exception search, noting that "police officers may conduct a warrantless search of a vehicle if they have 'probable cause to believe that the vehicle contains evidence of a crime.'" ¹¹⁴ To match that determination, the Court looked to the "objective facts known to the officers at the time of the search." Such probable cause "may come from a confidential informant's tip, when sufficiently detailed and corroborated by the independent investigation of law enforcement officers."

The Court looked to the following facts to find that probable cause:

¹¹⁴ Smith v. Thornburg, 136 F.3d 1070 (6th Cir. 1998); U.S. v. Lumpkin, 159 F.3d 983(6th Cir. 1998).

- (1) the car was previously seen on the premises but was slightly off the premises when searched;
- (2) the keys to the car were found inside Smith's residence;
- (3) Smith was a co-owner of the car;
- (4) Smith and his confederates were alleged to have "moved about when disposing of controlled substances by way of vehicles";
- (5) Smith and his confederates sold controlled substances out of vehicles;
- (6) a significant amount of cash was found at Smith's residence;
- (7) there was a history of drug dealing on the premises;
- (8) residue was found in baggies in trash pulls at the residence;
- (9) guns were discovered in the residence; and
- (10) there were "other indicia of a lifestyle" that would suggest drug dealing.

At the least, the Court agreed, the facts were sufficient to provide probable cause to be taken as part of the seizure. In particular, the Court noted that Smith owned a number of vehicles, many of which had been observed in transporting drugs. Even though the officers "had no information or evidence regarding the specific car searched - the green Pontiac Grand Am." They did, however, "have evidence of Smith using other vehicles to transport drugs or transact drug deals." In addition, it had been on the premises until just prior to the execution of the warrant, and they knew the vehicle was registered to Smith and his girlfriend. By the time they searched the vehicle, they had been told by an informant that he had received a large shipment of cocaine, and had already found plastic baggies with cocaine residue in the residence. Since they had not yet found the quantity of cocaine they were expecting, they believed that there was a "fair probability" that the drugs were in the vehicle.

Smith argued that the automobile exception did not apply, because the vehicle was not mobile. The police had the keys and both owners of the vehicle. The Court however, noted that "both this court and the Supreme Court have reiterated on numerous occasions that the automobile exception is justified not only by the exigency created by the 'ready mobility' of vehicles, but also by the lesser expectation of privacy operators have in their vehicles."

The court found that the evidence from the vehicle was properly seized, and upheld the trial court's decision.

The Court also noted that the search could also have been upheld as an inventory search despite Smith's argument that the Michigan task lacked a policy authorizing the seizure.

At the suppression hearing, however, Lewkowski established the existence of a WEMET inventory policy regarding vehicles seized for forfeiture. Lewkowski testified that, pursuant to the WEMET policy, officers must complete a form indicating any property found in the vehicle. The detective agreed that it was the WEMET's "standard operating procedure" to do a full search of a vehicle taken into custody. "Whether a police department maintains a written [inventory] policy is not determinative, where testimony establishes the existence and contours of the policy."¹¹⁵

¹¹⁵ U.S. v. Tackett, 486 F.3d 230, 233 (6th Cir. 2007) (accepting officers' testimony as proof of inventory policy).

Since it was clear that the vehicle was seizable as “forfeitable contraband” and that the detective testified as to the inventory policy, the Court found it was properly seized and searched.

Turning to the residence, the Court found that even though the CI was not identified to the judge, the “affidavit amply describes the reliability of the CI.” In particular, the Court looked to U.S. v. Allen.¹¹⁶

In *Allen*, this court, sitting en banc, sought to clarify Sixth Circuit law “regarding the necessary requirements for the issuance of a search warrant based on uncorroborated information from an informant.” The court noted that there is no general proposition “that a CI’s information must always be independently corroborated by police, or that an affidavit must in every case set out and justify a CI’s expertise in identifying the particularities of the criminal activity alleged.” The court explained that an affidavit should be “judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added.”

In this case, the Court found that “numerous factors ... compensate for the CI’s lack of personal observation of cocaine” at the Smith residence. The CI had proved credible in previous cases. The Court upheld the warrant and the search of the residence pursuant to the warrant.

U.S. v. Stuart
507 F.3d 391 (6th Cir. 2007)

FACTS: On March 25, 2003, Hale was stopped for speeding by a Michigan officer. A “gallon-sized bag of marijuana” was in his car, and he was arrested. Hale spoke to officer Costley, of the Jackson Narcotics Enforcement Team. Hale stated that he had gotten the marijuana from Stuart, that he regularly bought marijuana from him, and that he’d seen “an additional ten pounds” at Stuart’s home. Costley got a search warrant, describing the events surrounding the traffic stop and Hale’s statements. The warrant was approved that same day, and when it was executed, the officers seized four pounds of marijuana, scales, body armor and an array of weapon. Stuart was indicted.

Stuart sought suppression, “[r]elying on a difference between the date of the warrant (March 25) and the date of the incident report (March 23). He claimed that the officers forged “documents in order to cover up the fact that the search occurred before the officers had a warrant.” Stuart offered an affidavit from his girlfriend to the effect that the search occurred on March 23. The government “provided several documents—five officer activity logs, a towing report, a condemnation document, dispatch logs, canine search documentation, fingerprint records and a booking report—showing that the search occurred on Tuesday, March 25.”

The trial court refused to entertain the motion, and eventually, Stuart was convicted. He appealed.

ISSUE: Is a mistake on a warrant sufficient to overturn it?

HOLDING: No

¹¹⁶ 211 F. 3d 970 (6th Cir. Tenn. 2000)

DISCUSSION: Stuart argued that the error entitled him to a hearing under Franks.¹¹⁷ The Court stated that “Stuart fails to come to grips with the fact that he did not make a threshold showing that the warrant affidavit contained deliberately or recklessly false information.” The Court found nothing to indicate that Costley “made any deliberately false or reckless claims in the affidavit.” Further, the Court that the use of “Hale’s post-arrest statements to support a warrant application” was appropriate. The Court found nothing to show that Costley’s actions were done recklessly or with “malicious intent.”

After disposing of several other issues, the Court affirmed his conviction.

SEARCH & SEIZURE – EXIGENT ENTRY

Ferguson v. Unicoi County, Tenn.
2007 WL 881527 (6th Cir. Tenn. 2007)

FACTS: On the day in question, Erwin (Tenn.) PD officers “received a tip from a reliable informant that [a] fugitive [they sought] was in [a] dwelling.” They put the building under surveillance, and subsequently, the tipster called back to tell them that the “fugitive had left.” However, since the officers had “checked out the only vehicles seen leaving the dwelling, they concluded that this information was erroneous and that the fugitive, therefore, was still inside.”

The officers contacted the Sheriff, who arrived on scene. They made several requests to enter, but “those requests were refused.” The Sheriff contacted the county prosecutor who advised “that an entry was justified but that the search should be limited to only those areas where a person could be found.” The officers entered, conducted a brief search, during which time the occupants, including Maria Ferguson, could have left at any time. The entire process took about 45 minutes.

Several of the individuals in the house at the time of the search then sued, under 42 U.S.C. §1983. The U.S. District Court awarded summary judgment to the defendant officers, and Ferguson, and others, appealed.

ISSUE: May a belief that a fugitive is hiding in a specific location justify an exigent entry?

HOLDING: Yes

DISCUSSION: The Court quickly agreed with the trial court that 1), the initial traffic stop was justified under Terry and 2) that the “officers had an objectively reasonable belief that the fugitive might be hiding inside.”¹¹⁸ In fact, it noted, the “search was conducted in the least intrusive manner possible under the circumstances.”

The U.S. District Court’s decision was affirmed.

NOTE: *Although the entry was approved in this situation, if officers have reason to believe an individual is in a location not listed on the arrested warrants, officers are advised to consider obtaining a search warrant for the fugitive at that location, if time permits.*

¹¹⁷ Franks v. Delaware, 438 U.S. 154 (6th Cir. 1978).

¹¹⁸ Brigham City v. Stuart, 126 S.Ct. 1943 (2006).

SEARCH & SEIZURE - PROTECTIVE SWEEP

U.S. v. Edgerson

2007 WL 2050844 (6th Cir. 2007)

FACTS: On April 14, 2004, Edgerson surrendered to Detroit officers outside his girlfriend's apartment, where he had been staying. They had arrived in response to a tip that Edgerson was armed and dealing in marijuana. Edgerson had exited the apartment with two other men, and none were "armed or carried any contraband." Edgerson was arrested, pursuant to a warrant.

The officers "then made a brief warrantless entry into the home under the auspices of a 'protective sweep'" - apparently finding nothing. The leaseholder/girlfriend arrived and gave consent to search. She did not know, at the time, that the officers had gone briefly through the house. During that second search, the officers found a quantity of marijuana and a hidden handgun. Edgerson was further charged with a variety of offenses as a result of what was found.

Edgerson moved for suppression, claiming that the search was done with warrant or valid consent. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Does a protective sweep require that officers suspect someone in the house might be a danger to them?

HOLDING: Yes

DISCUSSION: The Court noted that a "protective sweep of a residence, conducted after an arrest has been made outside the residence, is justified only if the officers can demonstrate an articulable basis for their reasonable believe 'that *someone else inside the house* might pose a danger to them.'¹¹⁹ The prosecution argued that the "police had an articulable fear because one officer saw movement inside the house before Edgerson surrendered and because the tip contained information that Edgerson was armed." However, the Court found that they did not show "any articulable facts that would lead to the rational inference of a threat *after* Edgerson had surrendered, unarmed."

The Court found that the initial sweep was unlawful, but found that Manley's consent was not tainted by that earlier improper search, however, and as such, that the evidence was admissible.

Edgerson's plea was upheld.

¹¹⁹ U.S. v. Colbert 76 F.3d 773 (6th Cir. 1996).

SEARCH & SEIZURE - PLAIN VIEW

U.S. v. Garcia

496 F.3d 495 (6th Cir. Mich. 2007)

FACTS: Garcia, and others, were involved in a “large-scale plan to transport and distribute mass quantities of marijuana.” One of the shipments was destined for Birch Run, Michigan. On November 30, 2002, during an investigation of the conspiracy, officers were doing surveillance of several of the men who were staying at a local hotel, by “listening through cracks in the adjoining doors, monitoring individuals entering the room, and reviewing phone records.” They heard several incriminating statements. When two of the men left the hotel, in a Suburban, the officer attempted to follow as they traveled about, meeting with others and buying “industrial” supplies. On December 2, Ovalle and Canales checked out of the hotel, expressing concern that “too many people were asking too many questions.”

That same morning, Garcia and Rodriguez arrived at the Bay City airport and got a ride on the hotel courtesy van to the hotel, claiming that their boss (Ovalle) was staying there. The manager authorized the ride and notified Officer Berent of what had occurred. Although Ovalle had checked out, he returned to pick up the two men. During that same time, Officer Berent had gotten approval to make an investigative stop of the Suburban. Shortly after Ovalle picked up the two men and their luggage from the hotel, officers “executed a ‘felony stop’ of the Suburban.” A number of officers were involved in the stop, with weapons drawn, and ordered the five men in the vehicle to “exit the vehicle, walk backwards towards the officers, and get down on their knees.” The men were handcuffed, frisked and secured in police vehicles. During his frisk, Garcia’s pager was removed, and it was eventually admitted as evidence in his trial. The men were formally arrested later that day.

During the stop, a police canine sniffed the vehicle and made several “hits.” The officers used that information to get a warrant, and when the vehicle was eventually searched, they found “miscellaneous papers, luggage, briefcases, power tools, a high-capacity scale, and more than \$25,000 in cash.” Specifically, in luggage identified by its tag as belonging to Garcia, they found two bundles of \$5,000 each, wrapped in green plastic. In a tractor-trailer found in the parking lot of the hotel that Ovalle had moved to, they found over 3,000 pounds of marijuana hidden behind a false wall.

During that same time frame, Officer Fowler (San Antonio, TX, PD) was also investigating Garcia and his wife. Shortly after Garcia’s arrest in Michigan, he received an anonymous tip that cocaine could be found at the Garcia home. Officer Fowler got a warrant to search the home, specifying only cocaine, and an arrest warrant for Susana Garcia. Officer Fowler was accompanied by other San Antonio officers, along with DEA and IRS agents, to conduct the search. They found “small amounts of cocaine and marijuana at the residence and seized hundreds of documents.” The documents included “crumbled pieces of notebook paper displaying various mathematical calculations,” and “documents from the file cabinets located in the master bedroom” - “receipts and other financial records showing the vast discrepancy between the Garcias’ reported income and their yearly expenditures.” Approximately 20 of those documents were eventually introduced against Garcia at trial.

Garcia and others were charged with conspiracy. Garcia was convicted, but that first conviction was overturned for procedural reasons. In 1998, he was re-charged, and after a number of procedural issues were resolved, the prosecution went forward. In 2002, he requested suppression of the items found during

the arrest and during the search. The trial court denied the first and partially granted the second. In 2003, he was convicted, and appealed.

ISSUE: May documents (in plain view) be seized during a search under a warrant that lists only drugs?

HOLDING: No (but see discussion)

DISCUSSION: The Court first addressed the stop of the Suburban and Garcia's frisk. The District Court declined to suppress either the items found in Garcia's luggage or the pager, holding, in particular, that the "pager was properly seized pursuant to a Terry patdown." The Sixth Circuit found that the stop was properly supported by reasonable suspicion in that the officers had "specific and articulable facts" that justified that suspicion. Next, the Court looked at the canine sniff and whether it "exceeded the permissible scope or duration of the investigatory stop." The Court noted that "[a]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."¹²⁰ In addition, the "scope of activities conducted during an investigatory stop 'must reasonably be related to the circumstances that initially justified the stop.'"¹²¹ Since the officers "reasonably suspected" the men of "illegal drug trafficking," using the dogs were "directly related to investigating this suspicion." The sniff was "permitted within a half hour of the stop" and the Court noted that it "had previously upheld a 'thirty-five minute wait for the canine unit.'"¹²²

The Court upheld the denial of the suppression for the items seized from the vehicle.

Next, the Court addressed the seizure of the pager. Garcia argued "that Terry does not justify the seizure of his pager because Terry permits only the seizure of items that reasonably appear to be weapons, not other evidence of crime." The Court quickly agreed with Garcia that the pager was improperly seized, but concluded that "the pager would inevitably have been lawfully discovered" and as such, it was appropriate for the trial court to deny suppression. The Court elaborated on the issue, and explained that given what the officers knew or reasonably believed, the frisk was justified, but noted that the prosecution "did not elicit testimony from the seizing officer claiming that he mistook the pager for a weapon, and even assuming that the officer knew that the concealed object was a pager, it is clear that a pager is not contraband." As such, the seizure could not be justified under Terry. However, under the rule of inevitable discovery, and the fact that discovery of cash in Garcia's luggage and other evidence in the Suburban, Garcia was lawfully arrested, and as a result of that arrest, he would have been searched. The pager would then have been seized as "evidence of his involvement in drug trafficking."¹²³

The Court then moved on to the search in San Antonio, of Garcia's residence. The Court noted that the "warrant authorizing the search of Garcia's residence [was] for cocaine and nothing more." Nonetheless, the officers "seized over a hundred documents from" the house." Garcia argued that the officers indulged in an "invalid 'general search' by flagrantly disregarding the limits of the search warrant" and that the seizure was "not within the plain view doctrine exception to the warrant requirement." However, because Garcia "couch[es] his argument as a challenge to the extent of the officers' seizure, rather than the scope of

¹²⁰ U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005), quoting Florida v. Royer, 460 U.S. 491 (1983).

¹²¹ U.S. v. Richardson, 949 F.2d 851 (6th Cir. 1991).

¹²² See U.S. v. Orsolini, 300 F.3d 724 (6th Cir. 2002).

¹²³ See Nix v. Williams, 467 U.S. 431 (1984).

their search," that his argument on the "general search" must fail, noting that the search warrant for drugs would permit officers to search virtually "every area of the house."

However, the Court felt differently about the items actually seized. "The warrant in this case did not authorize the search for or seizure of document or drug paraphernalia, and the officers therefore cannot rely on the warrant to authorize their seizure of the documents." The Court noted that the trial court had "meticulously reviewed each of the proffered documents, finding that most of them were lawfully seized pursuant to the "plain view" exception to the warrant requirement, but rejecting some that were not." Garcia, however, argued that none of the documents were subject to the "plain view" doctrine. The Court commended the trial court's "painstaking and conscientious attempt to resolve [the] issue, but" agreed with Garcia "that the documents seized from his residence did not come within the plain view doctrine."

The Court noted that under Coolidge v. New Hampshire¹²⁴, that there must be four factors satisfied for the plain view doctrine to apply:

- 1) the object must be in plain view;
- 2) the officer must be legally present in the place from which the object can be plainly seen;
- 3) the object's incriminating nature must be immediately apparent; and
- 4) the officer must have a right of access to the object.

Garcia argued that since the second and the fourth factors were not satisfied, the seizure was unlawful. The Court quickly discounted the second factor, finding that the officers (both state and federal) were all lawfully present. However, the third factor proved more troubling. The Court noted that Horton stated that the "seizure of an item in plain view 'is legitimate only where it is immediately apparent to the police that they have evidence before them.'"¹²⁵ Officer Fowler had stated that they found it "necessary to look through Garcia's papers and envelopes to ensure that they did not contain small packets of cocaine, but he acknowledged that it was unnecessary to read the documents in executing the search for cocaine." (The DEA agent, however, "expressly testified that he read and reviewed every document that he thought might contribute to his federal investigation of Garcia.")

The Court stated that the "'immediately apparent' requirement is a vital constraint on the plain view doctrine exception to the Fourth Amendment warrant requirement." The court found the restraint "necessary to prevent officers from using the plain view doctrine as a means to extend a particularized search authorized by Fourth Amendment principles into an unlawful exploratory search." The Court concluded that the "criminal nature of most of the documents seized by Officer Fowler and Agent Belton was not immediately apparent" since "[n]either the intrinsic nature nor the appearance of most of the documents gave the officers probable cause to believe that they were associated with criminal activity." In addition, "the officers did not, as a result of the 'instantaneous sensory perception' recognize the incriminating nature of most of those documents." The items were, on their face, "lawful and innocuous items" and the officers had to "undertake 'further investigation'" in order to make their criminal nature clear.

The Court concluded that certain items should have been suppressed, including a map with locations circled, financial records, invoices and receipts. The "notebook paper" which "displayed scribbled mathematical calculations" was a closer call. The Court noted, however, that instead of saying that he

¹²⁴ 403 U.S. 443 (1971); see also Horton v. California, 496 U.S. 128 (1990) and U.S. v. McLevain, 310 F.3d 434 (6th Cir. 2002).

¹²⁵ Horton, *supra*.

immediately recognized the incriminating of the paper, which was found in a container that reeked of marijuana, he had to 'closely examine' the paper to determine its incriminating nature."

The court found that the "close inspection of the documents constituted a further search unsupported by probable cause and thus [it] violated the Fourth Amendment." However, ultimately, the Court found that given the wealth of other information against Garcia, the error in admitting the documents was harmless and upheld his conviction.

SEARCH & SEIZURE - TIPS

Campbell v. Stamper/Lee
2007 WL 1958629 (6th Cir. 2007)

FACTS: On Oct. 3, 2004, "an unidentified 911 caller notified the Kentucky State Police that a man was on the side of the road pointing a .22 rifle at passing motorists." Troopers Stamper and Lee were dispatched to investigate. They found "Campbell leaning on a guardrail next to the highway" with a rifle propped up next to him. They drew their weapons, ordered Campbell to move away from the gun and to lie down on the pavement. He was frisked and handcuffed. However, after questioning Campbell, the troopers concluded he had done nothing illegal and he was released.

Campbell filed suit against the troopers, under 42 U.S.C. §1983. The troopers requested summary judgment, and trial court granted it. Campbell then appealed.

ISSUE: May a corroborated anonymous tips support an investigatory stop?

HOLDING: Yes

DISCUSSION: The Court looked at the facts known to the troopers, and found that there could "be little doubt that Stamper and Lee had reasonable suspicion to support their investigatory stop." Further, "[t]hey had every reason to suspect that Campbell could be the individual identified by the 911 caller." Campbell cited Florida v. J.L.¹²⁶ and Alabama v. White¹²⁷ for the premise that an anonymous tip was not, in itself, sufficient to make reasonable suspicion. The Court, however, stated that "[w]hile not inaccurate, Campbell's argument oversimplifies the inquiry" and "ignore[ed] critical factual distinctions." In this case, Campbell was found "standing by the side of a public inquiry, where pedestrian traffic is hardly commonplace" and matched the original complaint.

During oral argument, Campbell conceded that the troopers had sufficient reasonable suspicion to justify the original stop. However, he challenged the "degree of force" the troopers used against him. The Court noted that "police officers may draw their weapons and use handcuffs without offending the Fourth Amendment if they reasonably believe that a suspect is armed and might pose a danger to them as they conduct their investigation."

The court upheld the decision of the trial court.

¹²⁶ 529 U.S. 266 (2000).

¹²⁷ 496 U.S. 325 (1990).

U.S. v. Graham
483 F.3d 431 (6th Cir. Ohio 2007)

FACTS: On Sept. 13, 2003, Officers Halburnt and Malson (Dayton, OH, PD) were patrolling when they discovered a vehicle illegally parked outside a residence. The driver's door was open. The officers approached on foot and saw a male driver and a female passenger. Officer Halburnt saw the male (Graham) "dip his shoulder, as if he was putting something under the seat." Halburnt told the driver to keep his hands on the steering wheel, and asked if he realized the car was illegally parked. Halburnt asked for ID, which Graham was unable to provide. He stated, however, that his name was Tony Graham.

Earlier that evening, Halburnt had heard a broadcast from Officer Stivers "to the effect that it was possible that Tony Graham was armed and was planning to shoot someone at" the address where the vehicle was parked. Graham stepped out of the car, upon request, and walked back to the police cruiser with Halburnt. Halburnt told Graham that he "was going to pat him down" and that Graham would then "have to sit in the back of the cruiser." Graham refused both and "began to walk away." Halburnt and Malson attempted to grab Graham, but he resisted and struggled with the two officers. Halburnt sprayed him with OC and Graham stopped resisting - he was handcuffed, frisked and placed in the cruiser. (The opinion notes that the handcuffing and restraint in the cruiser were "solely for the purpose of officer safety" and that he was not under arrest at the time.)

Returning to Graham's vehicle, Halburnt found a firearm under the driver's seat. Halburnt gave Graham his Miranda warnings, and Graham admitted to keeping the firearm "for protection." Graham was a convicted felon, so he was charged and indicted for his possession of the weapon.

Halburnt moved for suppression. Because there was no evidence presented "establishing the reliability of Stivers' statement," the Court viewed it as an anonymous tip. Using the precepts of Alabama v. White, the Court found that Stivers' broadcast "contained information which predicted Graham's future behavior" - that he would be found at a particular address. Once the officers learned that the male driver was, in fact, Tony Graham, the tip was further considered predictive, and coupled with the "dipping motion" "was sufficient to establish reasonable suspicion that Graham was armed and dangerous, and therefore, the search did not violate Graham's Fourth Amendment rights." The District Court denied the motion; Graham took a conditional guilty plea, and appealed.

ISSUE: May a vehicle be the subject of a Terry frisk?

HOLDING: Yes

DISCUSSION: Graham argued that the officers lacked "probable cause to stop him for a parking violation." He further contended that "even if the stop was lawful, the searches of his person and the vehicle were not supported by reasonable suspicion"

The Court quickly put aside one of the government's assertions, that "once an individual is legitimately stopped, for any reason, police who receive an otherwise unreliable tip have carte blanche to perform a protective search of the person (or his effects). However, in reading Florida v. J.L., the Court noted that "'a person who has already been legitimately stopped' refers to a person who was already lawfully stopped for the same reasons that serve as the basis for the protective sweep" and that there "[c]learly must be some nexus between the criminal conduct of which the police suspect the defendant and the aim of the

protective sweep - the most obvious example arising where they suspect him of illegally carrying a gun." The Court found it "hard to imagine how suspicion of a parking violation, by itself, could ever justify a protective search of a suspect's person." The Court noted that:

While the officers ... were completely within their rights to carry out their duties related to the parking violation, with respect to investigating any *other* crimes, they were bound by the same constitutional limitations that they would have been had they encountered Graham while he was doing nothing illegal at all.

The Court emphasized that the "Supreme Court has *never* authorized a protective sweep on anything less than reasonable suspicion that a suspect was armed and dangerous." The Court noted that had the search been based only on an unreliable tip, it would have been suppressed. However, in this case, the Court stated that there was a clear traffic violation, and as such, the traffic stop was lawful. In assessing the legality of the frisk, the Court had to "determine whether the anonymous tip and the furtive movement observed by Halburnt, when considered together, support[ed] a reasonable suspicion that Graham was armed and dangerous." The Court looked to its earlier cases involving tips¹²⁸ and concluded that the combination of the two facts were sufficient to justify the frisk. The Court further agreed that, under Michigan v. Long, "if an officer possesses a reasonable suspicion that a suspect is armed and dangerous, he may conduct a brief protective sweep of the suspect's vehicle, so long as that search is constrained to places where a weapon may be hidden." As such, once the frisk of Graham's person was justified, a brief sweep of his car was also justified.

Graham argued that since he was secured in the cruiser at the time of the sweep, it could not be justified, but the Court noted that at the time, "Graham was merely detained, but not under arrest." Had they not checked the car, and "simply let him go, Graham would immediately have had access to the weapon once he reentered the car." Finally, the Court agreed that it was reasonable for Halburnt to rely upon information provided by another officer, presuming that officer's information source is credible.

The denial of Graham's motion to suppress was affirmed.

U.S. v. Cohen
481 F.3d 896 (6th Cir. Ky. 2007)

FACTS: On Dec. 17, 2004, at about 4:52 a.m., Officers Koenig and Pender (Jeffersontown PD) were dispatched on a "trouble run" - a 911 hang-up call. As Officer Pender approached the house, in a subdivision cul-de-sac, he spotted a vehicle leaving the area. Officer Pender stopped that vehicle, and Officer Koenig arrived within moments and pulled in front of the suspect vehicle.

Cohen, the driver, stepped out, but got back in the car when Officer Pender got out of his cruiser and approached. Officer Pender told him the reason for the stop, and asked him for his documents, but Cohen said "just shoot me, just shoot me." Officer Pender and Koenig conferred at the rear of the car about what to do.

Cohen got out and approached the officers with his hands up. When Pender again explained why he'd stopped Cohen, Cohen recited his operator's license number. While the officers were checking his

¹²⁸ Florida v. J.L., 529 U.S. 266 (2000); Alabama v. White, 496 U.S. 325 (1990).

information, they suggested that they sit in Officer Pender's car, with Cohen in the back seat, and Cohen agreed.

Within a few moments, the dispatcher asked Koenig, via code, if he was alone. After turning down Pender's radio, Koenig was told that Cohen might be wanted on an Indiana probation violation. He was also told that Cohen had an outstanding DVO. When asked, Cohen stated that he was on parole. Officer Hutchinson passed by, and he was asked to stay as well. Within a short time, the officers learned the Cohen's license was suspended and that there was a arrest warrant out of Indiana. By 5:27 a.m., he was under arrest.

Officer Koenig found ammunition in the passenger compartment, and a handgun matching the ammunition in the trunk. Eventually Cohen was indicted on federal charges of being in possession of the weapon and ammunition, and he sought suppression. The trial judge granted the motion to suppress and the prosecution appealed.

ISSUE: May a vehicle stop be justified solely by a 911 hang-up call that occurs in the vicinity?

HOLDING: No (but see discussion)

DISCUSSION: The Court stated by noting that, under the Fourth Amendment, an officer "may make an investigative stop of a vehicle only if the officer" has articulable reasonable suspicion that a crime is afoot." The Court reviewed the facts known to the officers at the time, and concluded that the facts were not sufficient to provide reasonable suspicion. It equated the "911 hang-up call, standing alone without follow-up calls by a dispatcher or other information, is most analogous to an anonymous tip." Although such tips "are not irrelevant in evaluating the totality of the circumstances," they "should be given little weight." The Court continued:

Citizens call 911 for many different reasons. A citizen may call 911 in order to report an emergency, be it criminal activity, a fire, or a medical emergency, but someone may also call 911 because he or she misdialed another number, accidentally activated a speed dial feature, or wished to pull a prank on the authorities. Thus, without any information from the caller, the silent 911 hang-up call was the equivalent of an anonymous 911 report that there might be an emergency, which might or might not include criminal activity, at or near the address from which the call was made. In that sense, the silent 911 hang-up call could be said to have suggested the possibility of, among other things, a limited "assertion of illegality," but, absent any observed suspicious activity or other corroboration that criminal activity was afoot, Officer Pender had no way of determining whether the silent 911 hang-up call was reliable in even that limited possible assertion.

In addition:

The silent 911 hang-up call also did not provide a description of Cohen or his car and thus did not identify any determinate person. The quick response of Officers Pender and Koenig made it possible to limit those potentially related to the silent 911 hang-up call to those people and vehicles within four minutes of the area surrounding Wooded Glen Court, and the early hour limited the number of people in that general area, but those limitations still fall short of identifying a determinate person.

Although other courts had found that such calls have more reliability, the court found that the “virtually complete lack of information conveyed by the silent 911 hang-up call and the total absence of corroborating evidence indicating that criminal activity was afoot” meant that the call carried little weight in such evaluations.

The Court held that the stop was not supported by reasonable suspicion, and affirmed the trial court’s decision to suppress.

SEARCH & SEIZURE – TERRY

U.S. v. Ivy

2007 WL 870386 (6th Cir. Tenn., 2007)

FACTS: On Feb. 10, 2005, Ivy was in a gas station parking lot in Memphis (TN). Memphis PD had been asked by the owner to patrol the lot on occasion, especially around a detached building on the lot that housed unused restrooms. While doing so, Officer White spotted Ivy, standing between a utility trailer and the detached building, and he turned his patrol car into an adjacent lot. “White saw that Ivy was carrying a golf club and another object that turned out to be a pill bottle.” White called out to Ivy to come to him, but instead, “Ivy walked away from White and around the trailer.” White could see underneath or through the trailer and “saw Ivy drop the pill bottle, pick it up and drop it again.” White located and picked up the bottle and saw that it “contained what appeared to be crack cocaine.” Doing a patdown, White located what he believed to be a gun, but he waited for backup to arrive before actually retrieving the gun from Ivy’s pants pocket.

Ivy was charged with possession of a firearm by a convicted felon. He moved for suppression, but was denied. Ivy was then convicted, and appealed.

ISSUE: Are suspects seized when they stop pursuant to a command to do so?

HOLDING: Yes

DISCUSSION: The Court concluded that Ivy was not seized when White first called to him, because Ivy “did not comply with White’s assertion of authority.” Further, once he abandoned the pill bottle, by dropping it, , “White was free to look inside the bottle and the discovery of the crack was not the result of an unconstitutional seizure.”

Once “Ivy did comply with White’s command to stop, he was seized for Fourth Amendment purposes; however, this seizure did not violate the Fourth Amendment under Terry v. Ohio.” The Court noted:

The totality of the circumstances supports White’s investigative stop of Ivy: White was familiar with the area and the fact that the manager of the gas station had previously complained of criminal activity in the very location where Ivy was loitering; White had previously observed criminal activity near the detached building; Ivy was loitering near the detached building with a golf club and a pill bottle in his hands; Ivy attempted to walk away

from White when White asked Ivy to 'come here'; and Ivy dropped the pill bottle before complying with White's command to stop.

Once the officer found the crack, the search leading to the finding of the gun was also lawful. Ivy's conviction was affirmed.

NOTE: Although the Court consistently referred to the search that led to the gun as a "protective pat-down," its opinion suggests that the Court considered the search to be justified as a search incident to arrest, following the officer's discovery of the crack cocaine in the pill bottle.

U.S. v. Wright
220 Fed.Appx. 417 (6th Cir. Tenn. 2007)

FACTS: Officer Offenbacher (Knoxville PD) was patrolling an area "known for drug activity, prostitution, and violent crime" when he spotted a woman leave an apartment building and get into the passenger side of a car. The car, driven by Wright, then crossed "the parking lot with its headlights off toward an alleyway at the rear of the building." Offenbacher followed and saw the passenger open the trunk to permit another person to place a "long, tubular bundle, which looked like a rifle, in the trunk." The car proceeded on and the lights were turned on. Offenbacher followed, passing the third person, who spotted Offenbacher and "jog[ged] away from the police car." Offenbacher continued following, activated his lights and called for backup. Officer Taylor arrived as Wright handed over his Tennessee operator's license and a Florida vehicle registration.

Wright acknowledged, upon being asked, that the item placed in the trunk was a rifle, but denied having any other weapons. Offenbacher asked Wright to step out and patted him down, finding what he recognized as ammunition (for a pistol, not a rifle). Wright stated it was for a weapon he had at home. Wright denied knowing anything about the rifle, but agreed to allow the officer to check the rifle's serial numbers. It was discovered to be a "loaded, ready-to-fire SKS assault rifle with a bayonet attached." Taylor then searched the passenger compartment and found a loaded, .390 cal. handgun, which matched the ammunition found.

Wright was found to be a convicted felon, and was charged with possession of the weapon. He requested suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Does placing a person in a police vehicle make a stop no longer a Terry stop?

HOLDING: No (but see discussion)

DISCUSSION: The Court quickly determined, first, that Offenbacher had a legally sufficient basis to stop the car because he had a reasonable suspicion that criminal activity had occurred or was about to occur." Further, because of the area of the stop, and the almost certain belief that there was a rifle in the trunk, the court found that the frisk, both of Wright's person and of the passenger compartment was also appropriate. (Wright did not raise the issue of the legality of Offenbacher reaching into his pockets to retrieve and identify the ammunition as such.)

Wright also argued that since the officer did not read him Miranda warnings when initially placing him into the police cruiser. The court noted, however that "merely placing an individual in a police car does not

automatically transform a Terry stop into a formal arrest.”¹²⁹ The court found that the “purpose of the questioning after the stop was to quickly confirm or dispel the officer’s suspicion of criminal activity.” The questioning took place “near an apartment complex, a non-coercive location.” The questioning was for less than 15 minutes. Because the Court found that Wright was not in custody while being questioning, the Court held that Miranda was not required.

Wright’s conditional guilty plea was affirmed.

U.S. v. Campbell
486 F.3d 949 (6th Cir. Ohio 2007)

FACTS: On July 22, 2005, at about 10:30 p.m., Officer Salser (Boardman Township, OH) was patrolling in an area that had been plagued with break-ins and car thefts. He was behind a vehicle, driven by Campbell, when it turned into the parking lot of a closed business. Officer Salser watched the occupant (Campbell) get out of the car, talking on his cell phone, and walk toward the road. He followed as that individual walked into the parking lot of another business across the street, also closed.

Officer Salser then drove into that lot and parked, and notified dispatch as to what he was doing. He did not run the other vehicle’s plate at that time. Officer Salser then approached Campbell on foot and asked if he was OK. Campbell explained that he was trying to pick up his girlfriend from work and didn’t know how to get to her location. Officer Salser spoke to the woman on the phone, got the name of the business, obtained the address from dispatch and provided it to Campbell.

Officer Salser then asked Campbell for his ID, “just to log that [the officer] talked to him.” Campbell replied that he lacked ID, although Campbell later stated that he had stated that he “didn’t have anything on [him]” Officer Salser asked for, instead, his name, DOB and SSN. Officer Salser later testified that Campbell appeared nervous and put up his hands, stating that he didn’t “want any trouble.” Again, Salser pressed him for identification.

Campbell gave his name as Steven Morris and gave a year of birth a year earlier than his actual birthdates. He told the officer he didn’t know his SSN. When dispatch was unable to verify the information, Salser believed that Campbell lacked an Ohio operator’s license. (Campbell later explained that he sometimes went by Morris because that was his father’s last name, although he carried his mother’s last name.)

Campbell became even more nervous, even walking in circles. When another officer arrived, Salser asked Campbell if he could “pat him down for weapons. Campbell put his hands behind his back and Salser proceeded to do so. Officer Salser “felt a bulge in Campbell’s left front pocket” - and when asked, Campbell identified it as money. He asked about the bulge in the other pocket, and Campbell stated that “he did not know what was in there.” Campbell agreed to the item being removed and it turned out to be marijuana.

Salser arrested Campbell and proceeded to do a more thorough search, finding \$862 in cash in his pants pocket and a loaded handgun under the driver’s seat of the car. Upon booking, it was discovered that Campbell had an outstanding warrant from New York, as well.

¹²⁹ U.S. v. Bradshaw, 102 F.3d 204 (6th Cir. 1996).

Campbell was federally charged for possession of the handgun, and moved for suppression, arguing the original stop was improper. The trial court agreed to the suppression, and the prosecution appealed.

ISSUE: Does simply asking for ID constitute a seizure?

HOLDING: No

DISCUSSION: The Court elaborated on what constituted a seizure - and focused on whether a reasonable person would feel free to walk away from the encounter.¹³⁰ Even if a encounter is consensual at the outset, to elevate it to a Terry stop, the officer must “have a reasonable suspicion of criminal activity” or, of course, probable cause for an arrest, to continue the seizure.

In this case, the prosecution argued that “Officer Salser had ‘reasonable suspicion’ to stop Campbell on the parking lot and conduct a pat down for weapons when the officer first approached him” and in the alternative, that he actually had probable cause to arrest when Campbell stated he lacked ID and that he was not actually seized until he admitted that he lacked such identification.

The Sixth Circuit noted that in Florida v. Bostick, the Supreme Court had ruled that “no seizure occurs when police ask questions of an individual, [and] ask to examine the individual’s identification, ... so long as the officers do not convey a message that compliance with their requests is required.”¹³¹ As such, the Court ruled that Officer Salser’s first request for ID did not constitute a seizure.

Next, the Court noted that Officer Salser had “observed Campbell driving a car and shortly thereafter asked to see his identification.” Since he was unable to produce an operator’s license, he had committed an offense under Ohio law. As such, a warrantless misdemeanor arrest was permissible, and that arrest was valid.

Finally, the court upheld the search of the vehicle as lawful as an inventory, since presumably the vehicle would not have been permitted to stay in the business parking lot.¹³²

The suppression was reversed and the case remanded for further proceedings.

Mitchell v. U.S.

233 Fed.Appx. 547 (6th Cir. Tenn. 2007)

FACTS: On Jan. 3, 2007, Memphis (TN) PD received a call about shots being fired by “six black males in dark clothing” at an apartment complex close to the police precinct. Officers Flagg and Grafenreed both responded, quickly, and found Mitchell, alone. Mitchell was alone, but matched the general description of the shooters. The officers approached him on foot and asked if he’d heard shooting and if he had a gun. Mitchell agreed that he had a gun, and Officer Flagg located it and secured it, putting Mitchell in the patrol car. The weapon was a fully loaded revolver and not stolen, so Mitchell was cited and released. However, since he was a felon, he was later indicted for being in possession of the weapon. He took a conditional guilty plea, and appealed.

¹³⁰ See Florida v. Royer, 460 U.S. 491 (1983).

¹³¹ 501 U.S. 429 (1991).

¹³² This search would likely have also been permitted as under search incident to arrest, as it has been extended in Thornton.

ISSUE: Is a request to search automatically so coercive as to invalidate the search?

HOLDING: No

DISCUSSION: Mitchell argued that he was improperly stopped by the officers. The Court noted, however, that a "request to search does not transform the initial questioning into a seizure."¹³³ The Court agreed that the officers' approach was consensual and that the officers did not display physical force or a show of authority, they did not have their weapons drawn or their squad car lights on, in fact, they were on foot. The Court further agreed that the frisk was appropriate, given that Mitchell acknowledged he had a weapon on his person. The trial court had found that the stop wasn't even a Terry stop, but was simply a consensual stop. Even though the initial description was vague, the Court agreed the initial contact was appropriate, and that it did not elevate to a seizure until they frisked him. Since the frisk was justified, it, too, was proper.

Mitchell's conviction was upheld.

SEARCH & SEIZURE - HOT PURSUIT

U.S. v. Johnson
488 F.3d 690 (6th Cir. Ohio 2007)

FACTS: On July 22, 2003, Cincinnati PD officers were watching a house, investigating narcotics complaints. Officer Dews observed a number of people on the front porch, including Johnson, and was familiar with one of them from previous arrests. Officer Dews observed several transactions take place with people who stopped by. He conveyed what was going on to other officers, and officers moved in on the house. Johnson then ran into the house. Officers Dukes and Hudson followed him, finding him hiding in a closet. Upon being challenged, Johnson tossed a gun out of the closet and eventually surrendered. He was arrested.

Johnson was indicted on trafficking and gun possession charges, and moved to suppress the evidence. The trial court denied the motion and Johnson was convicted. He appealed.

ISSUE: Is "hot pursuit" an exigent circumstance?

HOLDING: Yes

DISCUSSION: Johnson argued that the officers were required to knock and announce before entering the residence, and that their alleged "hot pursuit" was not a sufficient exigency to excuse that. The Court looked to U.S. v. Santana,¹³⁴ however, and found that the facts were almost identical in this case. The court found there was "no reason to believe that [Johnson] would answer a knock" and would be futile. The Court found the entry to be justified.

¹³³ U.S. v. Baro, 15 F.3d 563 (6th Cir. 1994).

¹³⁴ 427 U.S. 38 (1976).

Johnson also argued that Officer Dews should not have been permitted to give his expert opinion that the conduct he observed was drug trafficking, and that Johnson was “in charge,” since he had not been qualified as an expert. Apparently the trial court certified Johnson as an expert, which adds a “note of approval” to the jury. The Court questioned the process, but since the defense did not object at the time, found that it was not error to have considered the officer an expert. “Courts generally have permitted police officers to testify as experts regarding drug trafficking as long as the testimony is relevant and reliable.”¹³⁵ The Court found that Officer Dews “told the jury what he saw and what it meant to him as viewed through the lens of his expertise.”

Johnson’s convictions were affirmed, although his case was remanded for sentencing errors.

SEARCH & SEIZURE - INVENTORY

U.S. v. Tackett

486 F.3d 230 (6th Cir. Tenn. 2007)

FACTS: On June 21, 2004, Tackett’s “vehicle ran off the road and flipped over in Hardin County, Tennessee.” Tackett later claimed that he crawled away from the wreck scene with a backpack and a computer bag. A passerby stopped and assisted Tackett, calling for police and medical assistance, and stayed with him. Tackett “fell in and out of consciousness, yet he seemed worried about a dark-colored bag sitting on the ground nearby.” Deputy Franks opened the bag and discovered silencers and an illegal firearm, for which Tackett was later charged.

At trial, there was dispute as to precisely when the bag was opened, in that a trooper had allegedly already recovered a legal firearm from Tackett, who had a permit. Tackett suggested the officers were searching for firearms after finding that gun. The officers claim to have found the illegal weapons before the legal gun was discovered. In addition, the officers stated they have a “universally applicable policy of inventorying all items following an accident.” (Tackett alleged that they violated this policy by releasing one of his bags to a co-worker, but no proof was put forward to that effect.)

Tackett requested suppression, but the trial court denied it, “concluding that ‘the Fourth Amendment simply did not require Deputy Franks to choose between giving the backpack to a stranger, leaving the backpack on the road, or putting the backpack in his car or at the station without knowledge of the backpacks’ [sic] contents.’”

Tackett was convicted, and appealed.

ISSUE: May an inventory search be done, pursuant to an “understood” policy, on items let behind , outside of a vehicle, at the scene of a wreck?

HOLDING: Yes

DISCUSSION: The Court discussed the background of the inventory search doctrine, noting that “[o]ne recognized exception to the warrant requirement permits law enforcement officers to conduct inventory searches, including the contents of closed containers, so long as they do so pursuant to standardized

¹³⁵ U.S. v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006).

procedures.”¹³⁶ In addition, officers have “an established caretaking role” to the public.¹³⁷ However, “officers must conduct a permissible inventory search in good faith, not as a pretext for criminal investigation.”¹³⁸ When officers conduct an inventory search, however, they “do not enjoy their accustomed discretion; they simply follow the applicable policy.”¹³⁹ The Court ruled, however, that “[n]onetheless, officers may exercise some ‘judgment based on concerns related to the purposes of an inventory search’; for example, they may decide to open particular containers if they cannot determine the contents.” Simply because they suspect they may find contraband “does not invalidate an otherwise proper inventory search.”¹⁴⁰

Tackett raised three reasons to find that the inventory exception did not apply in this situation. First, he argued there was insufficient proof of a policy, but the court found that officers “testified at length” about their reliance on a “standard policy of inventorying all personal items and opening containers, with aims of attributing property ownership, protecting property, and preventing false claims.” The Court noted that a written policy is not essential, so long as the “existence and contours of the policy” are sufficiently proved.¹⁴¹ Second, he argued that his privacy interest in the bag outweighed the officer’s “interest in opening the bag.” The Court looked to U.S. v. Markland for guidance, in finding that it was the duty of officers “to protect citizens’ property and prevent crimes” and to protect themselves, and that justified inventory searches.¹⁴² Third, Tackett referred to Tennessee law and claimed that it prohibited such inventories unless relatives were present. However, the Court found that a breach of state law, in the absence of a federal constitutional violation, was not sufficient to bring a federal action.

The decision of the trial court was affirmed.

SEARCH & SEIZURE - OPEN FIELDS

Johnson v. Weaver

2007 WL 2780914 (6th Cir. 2007)

FACTS: On the day in question, Officers Weaver and Wolgemuth (Ohio Dept. of Natural Resources) were investigating a possible “out-of-season kill.” (A deer check-in station had reported the “delivery of a gun-shot carcass during Ohio archery season.”) They started their investigation by paying a visit to the identified hunter, MacIntosh.

When they arrived at his home, “they found their investigation immediately stalled by the locked gate and ‘No Trespassing’ signs a quarter mile up the driveway.” MacIntosh was a resident on property owned by Johnson - and Johnson promptly appeared, told the officers that MacIntosh was not there and that the officers must leave. The discussion escalated, and the officers arrested him.

Johnson was taken to jail, and the officers returned, with another officer (Tunnell), and found MacIntosh at home. MacIntosh told them that Johnson was his stepfather. MacIntosh first claimed he had shot the deer

¹³⁶ Colorado v. Bertine, 479 U.S. 367 (1987).

¹³⁷ South Dakota v. Opperman, 428 U.S. 364 (1976).

¹³⁸ Bertine, *supra*.

¹³⁹ Florida v. Wells, 495 U.S. 1 (1990).

¹⁴⁰ U.S. v. Lumpkin, 159 F.3d 983 (6th Cir. 1998).

¹⁴¹ See U.S. v. Player, 201 F.App. 331 (6th Cir. 2006).

¹⁴² 635 F.2d 174 (2d Cir. 1980).

with a bow, but Weaver, knowing that not to be the case, “suggested that MacIntosh show them the scene of the kill.” They passed through the barns and walked the fields, and found a 12-gauge shotgun shell some 75 feet from a “bloody spot on the grass.” At that point MacIntosh admitted that Johnson shot the deer and wrote out a statement to that effect.

Using that statement, the officers got a search warrant for both houses, finding, among other things, the shotgun that matched the expended shell.

Johnson sued under 42 U.S.C. § 1983, complaining that his Fourth Amendment rights had been violated. The District Court awarded summary judgment to the officers, and Johnson appealed.

ISSUE: Is a driveway part of the open field?

HOLDING: Yes

DISCUSSION: Johnson argued that “the officers trespassed when they defied his order to stay out and nevertheless proceeded up the driveway.” The Court, however, noted that “[w]hile it is axiomatic that the Fourth Amendment protects the home and its curtilage, the ‘land immediately surrounding and associated with the home,’ ... it is equally clear that this protection does not extend to the home’s neighboring open fields because those areas ‘do not protect the setting for those intimate activities that the [Fourth] Amendment is intended to shelter.’”¹⁴³ The Court found that the “driveway constitutes an ‘open field,’ and that “Johnson [could hold] no reasonable privacy expectation in it, and his efforts to shield that area from any manner of unwelcome guest prove inconsequential.”¹⁴⁴ The Court agreed that the officers trespassed, but noted that Oliver held that “this state-law violation is of no constitutional moment.”

Even though Johnson was present and refused to allow them entry, the Court found this to be no more than a subjective expectation of privacy, and that further, the officers knocking on MacIntosh’s door was permitted as well, even though Johnson owned the house.

Johnson also argued that the officers also searched his barns. Taking as true that they did so, even though the officers denied it, the court found that MacIntosh’s consent was at least apparently valid, since he was related to the owner and the deer tag listed the Johnson farm as his address. The barns, as a storage and garage location, was a common usage area, and were apparently either not locked or MacIntosh had a key.

The Court found that even though Georgia v. Randolph¹⁴⁵ would now indicate that Johnson’s refusal would supersede MacIntosh’s, the state of the law, “at the time of the challenged conduct” permitted the officers to accept MacIntosh’s consent as valid.

Finally, even though the warrant affidavit had several incorrect details, the Court concluded that it was sufficiently accurate to make constitutional muster. Further, even though the search “lasted an hour and included looking through private areas such as bedroom drawers and medicine cabinets,” even after the

¹⁴³ U.S. v. Oliver, 466 U.S. 170 (1984); Hester v. U.S., 265 U.S. 57 (1924).

¹⁴⁴ U.S. v. Rapanos, 115 F.3d 367 (6th Cir. 1997) explaining that the “presence of fences, closed or locked gates, and ‘No Trespassing’ signs on an otherwise open field . . . has no constitutional import.”

¹⁴⁵ 126 S. Ct. 1515 (2004).

officers located the shotgun and the shotgun shells, the court agreed that “more shotgun shells could be hidden elsewhere.”¹⁴⁶

The Court upheld the search.

SEARCH & SEIZURE – BUIE

U.S. v. Stover/Hinton

474 F.3d 904, 6th Cir. 2007

FACTS: Stover was arrested as a result of his involvement in a drug conspiracy that ranged from Texas to Ohio. As a result of the investigation into the conspiracy, Hinton was arrested and his house searched. During the course of clearing the house, officers found a crawl space off the garage filled with marijuana plants, and in another room, a handgun was found in plain view. The officers eventually got a search warrant for the property and seized a number of items, including drugs and more firearms. Eventually, both Hinton and Stover were convicted on drug trafficking charges. Both appealed.

ISSUE: May officers search all areas of a house where a person may hide during the course of a sweep search in conjunction with an arrest?

HOLDING: Yes

DISCUSSION: Hinton argued that the search that resulted in the discovery of evidence was invalid, in that the house was searched after he was arrested. The officers had an arrest warrant, but did not have a search warrant, but did “clear the house” following Hinton’s arrest. They did so because there was a second vehicle, owned by a local criminal, parked in the driveway, and they were “concerned that there was another adult in the house.” Hinton argued that “the original search exceeded the permissible scope of a protective sweep under Maryland v. Buie.”¹⁴⁷

The Court agreed that the plants were not located in “immediately adjoining” spaces or rooms to the location of the arrest. However, the Court found the car in the driveway to be of utmost importance, as that indicated that the driver could be visiting Hinton, even though the property was a duplex. Further, it was “undisputed that the crawl space could hold a person” and such a space makes a “good hiding place for a dangerous individual.”

After resolving several other issues, Stover and Hinton’s convictions were affirmed.

¹⁴⁶ See Brindley v. Best, 192 F.3d 525 (6th Cir. 1999).

¹⁴⁷ 494 U.S. 325 (1990).

SEARCH & SEIZURE - VEHICLE STOPS

U.S. v. Ellis

497 F.3d 606 (6th Cir. Ohio 2007)

FACTS: At about 3:23 a.m., on April 16, 2004, Trooper Topp (Ohio State Highway Patrol), spotted a truck, traveling on I-71, weaving and crossing the center line multiple times. He ran the plate and pulled over the vehicle.¹⁴⁸ The driver, a white male in his early 70s, was the registered owner of the vehicle, Arthur Daugherty. He admitted to being a little sleepy and did not appear to be under the influence.

The Trooper then spoke to the passenger, who denied having a license or knowing his SSN. He provided a name and birthdate. The Trooper asked the driver to get into the back seat of the cruiser, and later explained he did so to explore further the possibility that the driver might be intoxicated. During the six minutes of questioning, Daugherty admitted that the passenger had paid him some money to transport him to Cleveland, and that he did not recall the passenger's name. Trooper Topp continued to ask questions about the passenger. At one point the tape malfunctioned and picked up several minutes later, with the trooper continuing his questioning in the same vein. He returned to the suspect vehicle at 3:34 a.m. to continue question the passenger, who gave him an address and stated he had a valid Michigan license.

Trooper Topp ran checks through both Michigan and Ohio, with no success. The tape inside the cruiser recorded no audio during that time. At about 3:45 a.m., a canine unit arrived and Topp asked Daugherty for consent to search the truck. The trooper received a verbal consent, but not written because he lacked the proper form. During a search he find an "oily rag containing contraband under the passenger seat" but nothing else. Daugherty followed Topp back to the police station, and was eventually released without charges. The passenger, who turned out to be Ellis, made a phone call on a cordless telephone during this time at the station, in which he made incriminating statements that were recorded.

Ellis was charged on federal drug trafficking charges related, apparently, to the cocaine found in the vehicle. Upon Ellis's motion, however, the trial court granted his request to suppress the evidence found at the traffic stop and from the telephone conversation. The government appealed.

ISSUE: May a stop be longer than usual if the officer has a continuing suspicion they are trying to resolve?

HOLDING: Yes

DISCUSSION: The government argued whether Ellis had "standing to challenge the search and seizure" given that he was a passenger in the vehicle. The U.S. Supreme Court had recently held that "a passenger of a motor vehicle possesses the same standing of the driver to challenge the constitutionality of a traffic stop."¹⁴⁹ The Court noted that the "pivotal issue is whether ... the scope and duration of the detention transformed this legal traffic stop into an unconstitutional seizure." The trial court had found that the stop was lawful, but the extended detention, 22 minutes, was sufficient to render it unlawful.

The appellate court, however, noted that:

¹⁴⁸ Much of what is related is from the cruiser's videocam, and the times are as indicated by the video.

¹⁴⁹ Brendlin v. California, --- U.S. --- (2007).

Recently, in United States v. Garrido,¹⁵⁰ we upheld, as constitutional, an hour-long safety inspection of a vehicle following a lawful traffic stop. First, we surveyed our previous decisions in this area:

Compare United States v. Richardson,¹⁵¹ (concluding that the motorists' nervousness, their allegedly conflicting explanations of travel plans, and the movement of one from the back to the driver's seat did not suffice to create a reasonable suspicion); [United States v.] Townsend,¹⁵² (finding that ten factors, including dubious travel plans, three cell phones in the car, and the driver's history of weapons offenses, did not rise to the level of a reasonable suspicion); and [United States v.] Smith,¹⁵³ (concluding that nine factors, including the stoned appearance of one vehicle occupant, food wrappers in the car, and the nervousness of the occupants, did not establish a reasonable suspicion); with United States v. Davis, 430 F.3d 345, 355-56 (6th Cir. 2005) (holding that a driver's meeting with a known drug dealer justified continued detention until a drug-sniffing dog could arrive, but that additional detention after the dog failed to alert was unreasonable); [United States v.] Hill,¹⁵⁴ (concluding that eight factors, including a dubious explanation for a cross-country trip, nervousness, and the cash rental of a U-Haul, justified continued detention); and United States v. Erwin,¹⁵⁵ (holding that eight factors, including the lack of registration and any proof of insurance, and the nervousness and criminal record of drug violations of the driver, sufficed to justify continued detention).

Then, we analyzed the eight factors relied upon by the government for establishing reasonable suspicion for the hour-long seizure. Although each factor was innocuous, separately, we held that their combination, in total, amounted to reasonable suspicion of criminal activity.¹⁵⁶

In the present case, the seizure prior to the consent to search was not prolonged, but lasted only twenty-two minutes. A large portion of this detention was necessitated by the purpose of the initial stop and the need for the trooper to identify the occupants of the vehicle and determine the driver's ability to safely operate the vehicle. In obtaining the driver's driving license and vehicle registration, Trooper Topp was justified in asking the occupants general questions of who, what, where, and why regarding their 3:23 a.m. travel.¹⁵⁷

The Court further noted that, very early in the stop, Ellis gave Trooper Topp a name he was unable to confirm. The Court detailed the information known to Trooper Topp, as follows:

¹⁵⁰ 467 F.3d 971 (6th Cir. 2006).

¹⁵¹ 385 F.3d 625 (6th Cir. 2004).

¹⁵² 305 F.3d 537 (6th Cir. 2002).

¹⁵³ 263 F.3d 571 (6th Cir. 2001).

¹⁵⁴ 195 F.3d 258 (6th Cir. 1999).

¹⁵⁵ 155 F.3d 818 (6th Cir. 1998) (en banc).

¹⁵⁶ Garrido, supra.

¹⁵⁷ Hill, supra; Erwin, supra.

Thereafter, reasonable suspicion existed for the further brief detention of an additional eight minutes and twenty-one seconds (3:36:39 to 3:45) based on the combination of the following factors: (1) Trooper Topp's inability to confirm Ellis's false alias; (2) Daugherty's response of "not that he knew of" to Topp's question of whether the vehicle contained drugs or anything illegal; (3) Daugherty's lack of knowledge of defendant's name; (4) Daugherty's lack of knowledge where he had been in Cleveland; (5) Ellis's lack of knowledge of his social security number; and (6) the discrepancy regarding how much money Ellis paid Daugherty for the trip. While a prolonged detention may not have been justified, we conclude that, under these circumstances, the additional detention of eight minutes and twenty-one seconds for further investigation of Trooper Topp's reasonable suspicions was lawful and not a violation of defendant's Fourth Amendment right to be protected "against *unreasonable* searches and seizures."¹⁵⁸ U.S. CONST. amend. IV (emphasis added).

Ultimately, the court found that the "given the totality of the circumstances," the extended detention was appropriate. And, since the items originally suppressed were, in fact, found as a result of a lawful stop, the items found should have been admitted.

U.S. v. Sanford/Hill

476 F.3d 391 (6th Cir. Tenn. 2007)

FACTS: On Feb. 25, 2005, at about 4:30 p.m., Deputy Pruitt (McMinn County Tenn., SD) was patrolling I-75 when he noted a vehicle going a little under the speed limit. The car came up behind a slower-moving truck and slammed on the brakes, being unable to change lanes due to traffic in the other lane. Pruitt then activated his lights and stopped the vehicle.

Deputy Pruitt approached the driver's side, and upon request, received a New York learner's permit, the vehicle registration and insurance documentation, from Hill. Pruitt noticed "approximately fifteen air fresheners hanging on the turn-signal lever of the steering column" and later testified that indicated to him that the occupants might be trying to "disguise the odor of narcotics." He asked the passenger, Sanford, for identification, and Sanford was unable to provide it. Pruitt asked Hill to get out of the car so that he could question the occupants separately.

Hill told Pruitt that the pair were returning from a basketball game in Atlanta, and he was unable to identify his passenger beyond a nickname. Sanford, however, stated they'd been to Atlanta to "find 'women'" and that he hadn't been to a basketball game in years. He also only knew the driver by a nickname.

Deputy Pruitt called for assistance from Officer Johnson, who arrived in minutes, along with his drug-sniffing dog. Hill consented to a search of the vehicle. Deputy Pruitt patted him down, as well, finding several cell phones and a pager, along with a roll of \$20 bills. He had Sanford get out and also patted him down. When the deputy felt a bulge in Sanford's pants pocket, "Pruitt asked Sanford if the bulge was marijuana" – to which Sanford agreed. Johnson began to search the car, and at that point, Hill ran away.

¹⁵⁸ United States Bill of Rights, Fourth Amendment.

Shortly after the deputies found 8 kilograms of power cocaine in the car, Hill was captured. Both men were arrested under federal drug trafficking charges. They sought to suppress evidence found in the traffic stop, and were denied. Eventually, both were convicted and both appealed.

ISSUE: May officers make a traffic stop on a vehicle that briefly comes up very close behind another vehicle on the highway?

HOLDING: Yes

DISCUSSION: The Court noted that the legal standard for traffic stops in the Sixth Circuit is the “reasonable suspicion standard” when the “suspected violation is a criminal offense rather than a civil infraction.”¹⁵⁹ In this case, the “suspected violation” was a “misdemeanor traffic offense” and as such, must be “analyzed under the standard of reasonable suspicion rather than probable cause.” However, the Court concluded that “Pruitt had probable cause to stop Hill for a traffic violation.” The Court continued, stating that the “crux of this case is a question of law – whether Pruitt had probable cause or reasonable suspicion to believe that [Tennessee law] was violated when defendants’ vehicle was momentarily following another vehicle within a distance of ten feet while traveling 65 miles-per-hour and a third vehicle was passing in the passing lane.” The Court agreed that the deputy’s “ulterior motivations, if any, are irrelevant.”¹⁶⁰ The trial court had found Pruitt’s testimony credible. The court looked to U.S. v. Valdez¹⁶¹, noting that since that case is unpublished, it is “not precedentially binding under the doctrine of stare decisis” but can be considered for “persuasive value only.” Using that case as guidance, the Court concluded that the distance between the vehicles, ten feet, created a substantial, albeit momentary, danger “when both vehicles are traveling at interstate speeds.” (The Court also referenced U.S. v. Garrido¹⁶², a recently decided Kentucky case on a similar issue.)

The Court ruled “that Pruitt had probable cause to believe that a traffic violation had occurred and therefore was justified in making the initial stop of Hill’s vehicle.” The Court affirmed the convictions.

Nelson v. Riddle/Moore

2007 WL 570231, 2007 Fed.App. 0129N (6th Cir. Ky. 2007)

FACTS: In the evening hours of Aug. 21, 2002, Nelson left his parents’ home in Trigg County, near Cadiz, “to visit friends and shop at the Wal-Mart in Hopkinsville.” After midnight, on Aug. 22, he was returning home via U.S. Hwy 68, westbound.

At about 1:30 a.m., Nelson passed Officers Riddle and Moore, who were parked in separate patrol cars, apparently off on the shoulder of Hwy 68. (One of the two officers had a civilian ride-along with him.) As Nelson passed, “Moore told Riddle that he did not think Nelson’s car had a license plate” and both officers thought that the vehicle lacked the required illumination over the license plate.¹⁶³

¹⁵⁹ Gaddis v. Redford Twp., 364 F.3d 763 (6th Cir. 2004).

¹⁶⁰ Whren v. U.S., 517 U.S. 806 (1996).

¹⁶¹ 147 Fed.Appx. 591 (6th Cir.2005).

¹⁶² 467 F.3d 971 (6th Cir. Ky. 2006).

¹⁶³ KRS 186.170.

Riddle followed Nelson as he pulled off Hwy 68 onto a side road. Riddle later “estimated that he caught up to Nelson within three quarters of a mile from the offices’ original parked position.” He observed Nelson “cut the curve” and Riddle activated his lights and siren, “radioed to his dispatcher that he had initiated a pursuit” and he noted that “Nelson was failing to stop.” (Later, Chief Alexander stated that “a police siren can clearly be heard in the background of the radio communication between Officer Riddle and the dispatcher.”) Riddle later testified that “he had reached dangerously high speeds while chasing Nelson.”

The chase continued as Nelson made several turns, and at one point, “Nelson’s tail lights ... went out, as if Nelson had purposefully switched them off.” Moore joined the chase. Finally, “Nelson pulled into his parents’ driveway ... and he “jumped out of the car, threw both arms into the air and yelled ‘what?!’” Riddle later testified that Nelson might have been under the influence of something, as he “was slow to react to verbal commands and had bloodshot eyes.” He passed one Field Sobriety Test but failed another, and also failed the horizontal gaze nystagmus (HGN) test.” Riddle arrested Nelson for DUI and Fleeing and Evading in the First Degree. The citation indicated that the initial stop was attempted for a license plate violation, but that the reason for the stop escalated to “reckless driving, fleeing or evading police, and DUI suspicion.” Blood was drawn and later proved “negative for alcohol or narcotics.”

Nelson however, testified that he saw the two police officers and that “he did not see emergency lights on the police cars until he got out of his car and Riddle shouted at him.” “Nelson was placed in ‘deferred prosecution’ for six months, and at the end of that period, no further crimes having been committed, the Trigg County Attorney dismissed the charges against him.”

Nelson then sued the two officers, and they moved for summary judgment. The District Court denied that motion, finding that there was “a genuine issue of material fact as to whether Riddle had probable cause to stop Nelson’s vehicle.” The Court noted that “it is not clearly established in a particularized sense that a police officer violates probable cause standards by arresting a motorist for failing to stop when signaled to do so.” The officers appealed.

ISSUE: Is an individual’s “subjective awareness” or the officer’s objective observation of conduct the appropriate standard on which to judge probable cause?

HOLDING: The officer’s objective observations

DISCUSSION: The Court noted that “ultimate fact in this case was ... whether and when [the officers] signaled [Nelson] to stop.” The Court noted, however, that “Nelson never unequivocally stated that the emergency lights were not on prior to the time he got out of his car and Riddle shouted at him, but consistently couched his answers in terms of his ‘subjective awareness,’ which as [the officers] assert is irrelevant in assessing what a reasonably objective police officer would have believed.”

The Court found that “Nelson did not meet his burden of showing that the [officers were] not entitled to qualified immunity.” The Sixth Circuit reversed the order by the District Court, denying the officers qualified immunity, and remanded it back to that court to do so.

U.S. v. McGuire
2007 WL 4322164 (6th Cir. Ky. 2007)

FACTS: On July 3, 2005, just before 1 a.m., Officer Capps “was on routine patrol” in Kenton County. He spotted a vehicle “parked at the very end of a driveway that led up a long hill to a home.” It did not appear to be running and did not have its headlights on - it had two occupants. Officer Capps pulled in behind the vehicle and later agreed that there was “no way that the vehicle could leave.” He found the situation suspicious because of prior break-ins in the area and because of its position in the driveway. When the vehicle was opened, either by rolling down the window or opening the door, Capps could not recall, he “detected ‘a faint odor of marijuana coming from inside the vehicle.’” He asked the driver, McGuire, for a license or other ID, but McGuire had nothing. Neither did the passenger, a female who Capps learned later was 15. Capps used McGuire’s name, DOB and SSN to check, and learned that he had no outstanding warrants.

Continuing to smell marijuana coming from the car, Capps asked McGuire to get out. The teen passenger admitted that the couple had smoked marijuana earlier. Capps searched the vehicle and found marijuana and crack cocaine in the center console. Capps arrested McGuire. Capps searched the trunk and found a pistol.

McGuire was charged under federal law with possession of the cocaine with intent to distribute and with possession of the firearm - he was a convicted felon. McGuire requested suppression, claimed that the “warrantless seizure of his person and the subsequent search of his vehicle were unjustified.” The trial court found that “McGuire was not ‘seized’ by Officer Capps until after the law enforcement official smelled marijuana” Once Officer Capps smelled marijuana, he “possessed probable cause for a warrantless search.”

McGuire took a conditional guilty plea, and appealed.

ISSUE: Is it permissible to block in a vehicle (preventing its movement) during a Terry stop?

HOLDING: Yes

DISCUSSION: Although the trial court had found that the initial contact was a “consensual encounter,” the Court found that “the touchstone of any inquiry into the validity of a warrantless detention of an individual continues to be simply whether ‘the person to whom questions are put remains free to disregard the questions and walk away.’”¹⁶⁴ Because the police car blocked the McGuire vehicle into the driveway, the Court found that it was not consensual. However, the Court next looked to whether the encounter could be categorized “as an investigative detention.”

The Court found that “[i]n this case, there is little doubt that Officer Capps had not only articulable, but also reasonable, suspicions that McGuire might have been engaged in criminal activity.” Even though there were potentially innocent reasons for McGuire’s presence in the driveway, it was reasonable for Capps to suspect that some criminal activity might well be in progress. He was “justified in briefly detaining the occupants of the parked car to determine their intentions” and once he detected the odor of marijuana, the arrest was justified.

¹⁶⁴ U.S. v. Mendenhall, 446 U.S. 544 (1980)

The Court upheld the denial of the suppression of the evidence.

U.S. v. Walton

2007 WL 4395577 (6th Cir. 2007)

FACTS: On October 21, 2003, Officer Fisher (a Tennessee Drug Task Force) spotted a vehicle that was following a tractor-trailer too closely. He fell in behind it and noted that the license plate was partially blocked. He effected a traffic stop at about 7:38 a.m. Officer Fisher found Walton driving, and Larry White, Walton's uncle, as the passenger.

Officer Fisher explained the reason for the stop and requested Walton's OL. He also asked him to step out and come to the rear of the vehicle. Since Walton's OL was from Texas, he asked if they'd been driving all night. Walton stated that he and his uncle had taken turns, that they were on the way to New York for a fashion show and would then be going to a wedding in Philadelphia.

Fisher then went to speak to White and asked for the registration. When White opened the glovebox, Fisher saw a "1/4 inch stack of cash." White stated that they were going to New York for a wedding. He also told Officer Fisher that he did not have an OL. Officer Fisher used his cell phone to check on both Walton and White. While waiting for a call back, Officer Fisher told Walton, who appeared to be cold, to wait in the patrol car. There, Walton stated that his sister was who was getting married (which was a different couple than that claimed by White) and denied traveling with a large amount of money. Officer Fisher allowed Heidi, his drug dog, to run around the car, but she did not alert.

Dispatch called back and told Fisher that Walton had been arrested on trafficking charged and was "usually armed." Officer Fisher stated that the dispatcher did not tell him that Walton's license and registration were clear. (The Court later noted that since the call records indicated that the only information available to the dispatcher concerned Walton's license and registration, nothing else, that it would find that was the only information provided to Walton.)

Fisher, however, told Walton the dispatcher was "having difficulty verifying the vehicle registration" and asked for consent to search. Walton agreed and signed a consent to search form. Officer Utley, who had arrived, and Officer Fisher began to search the vehicle, when dispatch called back with additional information related to drug charges (of which Walton was acquitted) and weapons charges, of which he was convicted. White also had weapons and drug convictions on his records. Officer Fisher shared this information with Utley and they continued to search.

In the back of the vehicle, a SUV, Fisher found five heavy, solid, gift-wrapped boxes. Walton stated they contained "computers and dishes." They also found about \$1,500 in cash over the visor, apparently the same money that had been in the glove box previously. Walton refused a request to unwrap the boxes, so Fisher ran Heidi around the packages. She alerted to the packages, and all were found to contain cocaine.

Walton took a conditional guilty plea, to trafficking in cocaine, and appealed.

ISSUE: May an officer extend a stop as long as reasonable suspicion continues?

HOLDING: Yes

DISCUSSION: The Court noted that the “only significant issue” was whether Officer Fisher improperly continued the stop once he learned that Walton’s license, and the vehicle registration, were valid. The Court noted that the request to search came 1 minute and 18 seconds after he terminated the call with dispatch. Although he did mislead Walton by his statement that dispatch was having trouble, the Court found that the length of time was reasonable to continue the detention. Specifically, the Court found it was appropriate for Officer Fisher to use his knowledge and experience to extend his reasonable suspicion, and noted that a “totality of the circumstances analysis prohibits us from discounting certain factors merely because, separately, they could potentially have ‘an innocent explanation.’”¹⁶⁵

The Court reviewed a number of earlier cases on vehicle stops and reasonable suspicion, and found that in this case, “after the purposes of the traffic stop were fulfilled, the brief, continued detention was justified based on reasonable suspicion of criminal activity.”

Walton’s conviction was sustained.

SEARCH & SEIZURE - VEHICLE STOPS - WHREN

U.S. v. Marshall

233 Fed.Appx. 436 (6th Cir. Ky. 2007)

FACTS: In 2003, Marshall rented property in Robards. The property owner contacted the Henderson County Sheriff’s Office after “smelling a strong chemical odor coming from the outbuilding located on the property.” Detective Book met with the property owner, who then also related that she had watched two men leave the property in Marshall’s truck with the bed loaded with trash bags.

Detective Book and Dep. Keller went to the property and knocked, getting no answer. The property owner led to the officers to the outbuilding, and pointed out an exhaust fan that Marshall had installed. Detective Book spotted Marshall’s truck start to pull in, but then leave. Dep. Keller stated that he had seen a similar vehicle at a dumpster nearby when he’d been on his way to the scene. Book contacted a deputy in the area, Broshears, and directed him to “stop the vehicle for questioning.”

Dep. Broshears spotted the vehicle, and noted that it had “an expired Illinois license plate sticker.” He verified the plate and attempted to stop the vehicle, but it sped off. However, the driver (Marshall) stopped the vehicle within a few minutes. Broshears arrested Marshall for driving without a license, failure to produce evidence of insurance, driving under the influence, and expired tags. Detective Book came to the scene. Bruce, the passenger, told him that they’d discarded several garbage bags. Book located the described bags and found they contained gallon jars. They were field tested and found the jars contained ammonia and naphtha, evidence of methamphetamine manufacturing.

They returned to the rental property and secured it. They found another jar and bags similar to those found in the dumpster, near the carport in plain view. Book obtained a search warrant and it was executed that evening.

¹⁶⁵ U.S. v. Arvizu, 534 U.S. 266 (2002).

Marshall took a conditional guilty plea on various methamphetamine related crimes and appealed.

ISSUE: Is an expired license decal sufficient cause for a traffic stop?

HOLDING: Yes

DISCUSSION: Marshall contended that “Broshears did not have probable cause or a reasonable, articulable suspicion to stop his vehicle” and as such, the evidence must be suppressed. He challenged “Broshears’ credibility, arguing that the truck had a trailer hitch, which made it impossible for the officer to see the expired license plate sticker.” He noted that the radio transmission just prior to the stop had Broshears calling in the tag number but not mentioning that it was expired.

The Court found Broshears more credible than Marshall and further noted that “[s]ince driving with expired tags constitutes probable cause to stop a vehicle,” the stop was permitted.¹⁶⁶

Marshall also argued that the officers were searching the outbuildings prior to getting a warrant, based upon a “photograph of the outbuilding taken in daylight with its door open.” He noted that the warrant was not obtained until 8:30 p.m., and that it was dark then. Book, however, testified that the photos were actually taken after the search warrant was executed, including some taken the next day, despite the fact “all of the disks containing photographs are dated the 18th.”

Marshall’s plea was upheld.

SEARCH & SEIZURE - MISCELLANEOUS

Center for Bio-Ethical Reform, Inc. v. City of Springboro
477 F.3d 807 (6th Cir. Ohio, 2007)

FACTS: On June 10, 2002, Harrington, Patch and Henkel were employees and/or volunteers of the Center for Bio-Ethical Reform, Inc. (CBR). On that day, Harrington and Patch each drove trucks emblazoned with “graphic images of first-term aborted fetuses” along with contact information for the CBR, and Henkel drove as escort vehicle, a Crown Victoria, equipped with a video camera and a shotgun. All wore protective gear, including body armor. They were driving in the area near Dayton, Ohio. At the end of the day, they parked the vehicles at a farm, having already obtained permission from the property owner to do so. However, they became concerned when they got to the location, because they weren’t sure that the trucks could clear overhanging tree branches.

During that time, Officer Clark stopped Patch, having noticed that the trucks were blocking the main road and causing a back-up. “Clark asked Patch if the trucks were lost or needed assistance” and asked about his cargo. Patch told him the vehicles were “billboard trucks” and that they were campaigning against abortion. Clark later described Patch as behaving in an “extremely nervous” manner. Clark then left. However, he contacted Lt. Barton “to determine if [the men] were participating in some sort of government exercise.” He was directed to talk to Detective Parker and explain what he had witnessed. Within minutes Parker and Clark met up, along with another officer, Walsh. Apparently, the dispatcher, who relayed

¹⁶⁶ Whren v. U.S., 517 U.S. 806 (1996).

Clark's message to Parker, had mistakenly announced that the men had "assault weapons" as opposed to assault gear (body armor and helmets). When Clark realized the error, he corrected it with dispatch.

Detective Parker contacted Agent Morris, of the Dayton FBI office, and told him of the pictures on the trucks. "Purportedly concerned about domestic terrorism targeting abortion doctors and clinics," Morris decided to "grab a couple of guys and ... come by ... and find out who these people were or what they were doing." Parker recounted later that he was told to "prevent [the men] from leaving." During this time, other officers, Kuhlman, Piper and Hubbard arrived but "without specific direction" to do so.

In the meantime, the men had located an alternate location to park the trucks for the night, and they covered the sides of the trucks with tarps. They drove to the parking lot, followed by two police cars. (Because Harrington was better at maneuvering the large vehicles, he pulled the first truck out and then turned it over to Patch, and then went back to drive the other truck.) However, Henkel, in the escort vehicle, had been stopped, blocked in and surrounded by five officers. Some twenty minutes into the encounter, Henkel was ordered to stay away from the escort vehicle. At about 7 p.m., two hours after he was originally stopped, "officers asked Henkel for permission to search the escort car, and he said that he could not give permission as it wasn't his car." When asked again, "with greater force," he directed them to talk to Harrington. When they asked a third time, "more forcefully," Henkel said the only thing in the car that was his was a bag, and they could do what they wanted. After searching the car, at about 7:45 to 8 p.m., he was told by an unidentified FBI agent that they were going to "kick him loose" after which they got his name and other identifying information. He was released after about 15 minutes and went in search of the other two men. "At no time did the officers tell Henkel why he was not free to leave."

During that same time, Harrington and Patch, observing that they were being followed by officers who were apparently running with emergency lights, pulled over into a subdivision. A number of police cars surrounded the trucks. Officer Peagler approached the passenger side of Patch's vehicle, and he then walked around to the driver's side. Walsh had also approached, and had Patch get out. He was questioned as to his identity and the contents of the truck, and later, an FBI agent also inspected his ID. Clark approached Harrington's vehicle, had Harrington get out, and obtained ID.

Harrington later stated that he waited "for three hours." During that time, he "repeatedly asked Walsh why they could not leave" and she replied that she was waiting on direction from a supervisor. Walsh later agreed that the men weren't free to leave. The men were not handcuffed, placed into police vehicles or ordered to the ground.

Harrington agreed that he had verbally consented to a search of the trucks, but felt that he was "compelled to do so given the 'show of force.'" He further reluctantly agreed to a search of the bag, believing, as the officers suggested, that by permitting them to search the cab, he had already given consent to the search of the bag. (It was mentioned several times that various officers had their holsters unsnapped or had their hands on their sidearms.) At two different points, they had the two men raise the tarps and they took pictures of the side of the trucks.

Another FBI agent approached them and obtained Harrington's ID, and upon being asked why they were being held, told Harrington not to speak to him unless the agent spoke to him first. Harrington was permitted to call his attorney on his cell phone, but when Harrington gave Patch a camera, "one of the FBI agents purportedly grabbed the camera from Patch." Harrington was questioned "about CBR, the purpose of the trucks, and whether they had firearms in the trucks." One of the agents "indicated that once

Harrington 'settled down' and conveyed the group's purpose in a calm and 'cordial' fashion, 'any concern [he] had was dispelled' and [the men] 'were let go.'"

The men were released sometime after 8:30 p.m.

Following the incident, Chief Herdt (Clearcreek Township PD) directed Piper, one of his officers, to draft a "simple memo" that did not mention the names of the officers present to document what had happened. He perceived that it was "an FBI investigation" but later agreed that he did anticipate a lawsuit as a result of the incident. He specifically told Piper not to open a case file.

The men, and the organization, filed a lawsuit in Feb., 2003, alleging violations of the First, Fourth and Fourteenth Amendments. Upon motion by the Defendants, the officers and their municipal agencies (Clearcreek and Springboro), and the FBI agents, were awarded summary judgment.

Harrington, Patch and Henkel, and the CBR, appealed.

ISSUE: May a lengthy detention ripen into a de facto arrest, and if without probable cause, support a lawsuit for a false arrest?

HOLDING: Yes

DISCUSSION: The Plaintiffs alleged that the Springboro PD had an "unwritten rule" that once the FBI is summoned, the case becomes theirs. (The same allegation was not made about Clearcreek, however.) As such, the Court upheld the summary judgment in favor of the two municipalities.

The Court also quickly disposed of the claims against the federal officers.

The Court then moved on to the lawsuit against the individual municipal officers. The Plaintiffs alleged that they were "stopped and detained ... in retaliation for the message expressed on the sides of the trucks and have consequently chilled their free expression." The trial court had found that the stop was motivated by public safety concerns, and that the officers were thus entitled to qualified immunity.

The Sixth Circuit, however, using the process described in Saucier v. Katz, first looked at whether the officers violated a constitutional right.¹⁶⁷ In a First Amendment case, the Court evaluates the "exercise of free speech under the framework" set forth in Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle.¹⁶⁸ First, the "plaintiff must show that (1) he was participating in a constitutionally protected activity; (2) defendant's action injured plaintiff in a way 'likely [to] chill a person of ordinary firmness from' further participating in that activity; and (3) in part, plaintiff's constitutionally protected activity motivated defendant's adverse action."¹⁶⁹ In this case, the Court agreed that the First Amendment protects the display of signs concerning abortion, even if offensive to the viewer.¹⁷⁰ All parties agreed that the men were engaging on protected speech.

¹⁶⁷ 533 U.S. 194 (2001).

¹⁶⁸ 429 U.S. 274 (1977).

¹⁶⁹ See also Block v. Ribar, 156 F.3d 673 (6th Cir. 1998); Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999).

¹⁷⁰ See Hill v. Colorado, 530 U.S. 703 (2000); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

Next, the Court evaluated whether the officers' actions chilled the speech of the three men. The Court noted that Clark told Parker about the photos on the truck when he "contacted him to describe the encounter" and further, that Parker told Morris, of the FBI, about the photos. The officers apparently admitted having taken photos of the truck during the stop. Harrington testified that one of the officers talked to him about the graphic photos and about how children might see them and be upset by them. With this information before it, the Court then had to determine if the stop would have occurred, and/or been so lengthy, but for the protected speech, and it would then fall to the defendants to "bear the burden of proving that both the investigative stop and the rather lengthy detection would have taken place absent Plaintiffs' constitutionally protected activity." Although the Court agreed that the initial stop was justified, the Court noted that the "prolonged detention" "presents quite a different question in view of the fact that the initial searches revealed nothing to justify further detention."

Finding that the Plaintiffs' exercise of their First Amendment right at least in part triggered the police actions, the court next looked to whether that First Amendment right was clearly established, such that the officers would reasonably understand that they were violating that right. The Court quickly found that the officers should have been aware of the contours of that right, and that "government actions may not retaliate against an individual for the exercise of protected First Amendment freedoms."

The Court reversed the summary judgment in favor of the officers on the First Amendment claim.

Moving on to the Fourth Amendment claims, the Court engaged in the same analysis. The Court concluded that "the otherwise unobjectionable Terry stop ripened into an unconstitutional seizure in light of the undue and unjustifiable length of the stop." The court agreed that "[n]o 'reasonable person' in Plaintiffs' position would have felt 'free to leave' given the 'show of official authority'" at the two locations. Walsh's statement corroborated that Harrington and Patch, at least, were not free to leave, and the "significant number of law enforcement personnel – officers from two local police stations and later, the FBI" present further supported that view. The Court agreed that Clark's observations of the men "driving box-style trucks while dressed in body armor and Kevlar helmets, accompanied by a vehicle modeled to look like a law enforcement car" and in a "post- 9/11 and post-Oklahoma City bombing context, at a time when law enforcement officers were in a heightened state of alert to fight would-be terrorists." However, in this case, the "detention ultimately ripened into an 'arrest' probable cause." "In evaluating an investigative detention, courts consider not only the length of the stop, but also 'whether the police diligently pursue their investigation,' and whether they 'could have minimized the intrusion.'" Looking to the totality of the circumstances, the court noted that the detention did not "reasonably relate in scope to the circumstances which justified the interference in the first place" and "far exceeded the limited purpose of the stop." Even balancing the governmental interest with the men's individual liberty interest, the Court noted the men were "subjected ... to the public indignity of being personally detained" and they were "effectively held ... for three hours, ... in front of neighbors and onlookers who had stopped to assess the situation." The Court further stated that the men were "decidedly not free to leave during that three hour period."

In U.S. v. Davis, the court had "admonished that absent probable cause, officers may not detain citizens once their suspicions, however reasonable initially, have been dispelled in order to conduct a second search of the same nature."¹⁷¹ The Court stated that to "delay Plaintiffs for the purpose of enabling the FBI to arrive at the scene to conduct effectively the same investigations ... 'served no investigatory purpose.'" The Court concluded that the Plaintiffs' Fourth Amendment rights were violated by the detention.

¹⁷¹ 430 F.3d 345 (6th Cir. 2005).

(However, the Court did agree that the consent to search, given during the detention, was valid – and was effectively moot because nothing incriminating was found during the search anyway.)

In summary, the Court overturned the granting of summary judgment and qualified immunity in favor of the local officers, holding that “cases had long put reasonable officers on notice of the permissible bounds of conduct in executing Terry-type stops.”

42 U.S.C. §1983

Jolley v. Harvell

2007 WL 3390935 (6th Cir. Ky. 2007)

FACTS: On October 6, 2002, Officer Harvell (Calvert City PD) “saw a 1996 Honda stop at four-way stop intersections, for what the officer characterized as a ‘prolonged stop,’ approximately thirty seconds.” As it was dark, Officer Harvell could not see a plate of any kind. He pulled over the vehicle as it drove into a convenience store, finding it occupied by Jolley (age 19), the driver, and two friends, Konrad and Cunningham.

At this point, as captured on Harvell’s in-car video, Harvell approached and asked for Jolley’s license and insurance card, which Jolley provided. Harvell, believing he smelled marijuana, had Jolley get out, and asked him to perform several FSTs. Jolley was unable to successfully complete the one-leg stand and the walk-and-turn, claiming to be “too shaky.” He did pass the HGN, but Harvell felt that since that was for alcohol use only, he did not consider it determinative. Harvell arrested Jolley for DUI, believing him to be under the influence of marijuana. (The citation detailed the facts, as above, but the vehicle was found to actually have a valid temporary tag.)

Jolley (and the other men) denied having smoked marijuana, and Jolley’s tests indicated no marijuana in either blood or urine. A vehicle search, subsequent to the arrest, resulted in no marijuana being found. Three days after the arrest, the local newspaper ran a front-page story on the arrest. Approximately 6 months later, the charges were dismissed on the Commonwealth’s motion, and the newspaper ran a story about the result.

During that same time frame, Harvell was disciplined for having poorly performed the tests, and underwent remedial training. (He was also reprimanded for allowing one of the other passengers to leave with the car.)

Jolley sued under 42 U.S.C. §1983, claiming a violation of his Fourth and Fourteenth Amendment rights. Upon Harvell’s motion, the trial court granted summary motion in favor of Harvell and the city defendants, finding that the results of the tests gave Harvell probable cause make the stop, and ultimately, to arrest Jolley. Upon motion and reconsideration, the Court concluded that the failure of the one-leg stand indicated a 65% chance that Jolley was intoxicated, but found that he did not, in fact, fail the walk-and-turn. Even though the Court acknowledged that, in hindsight, it was apparent that he was not intoxicated, the Court found sufficient reason to grant Harvell qualified immunity.

Jolley appealed.

ISSUE: Does a failure to get a conviction mean the officer has insufficient probable cause to have made an arrest, and is therefore liable?

HOLDING: No

DISCUSSION: The Court reviewed the "DUI/Standardized Field Sobriety Testing Course" manual used during the time Harvell received his training. Jolley argued that Harvell failed to take into account that Jolley was cold and nervous, his reasons for failing the physical tests. Coupled with the unusual stop, the Court found probable cause for the DUI arrest.

Next, Jolley argued that since he was arrested for DUI (marijuana), that the manual's indication that his failures incident a 65% chance that he had BAC higher than .10, a factor that applied only to alcohol. The Court, however, found that a "reasonable officer could have interpreted a failure of the one-leg stand to indicate some form of impairment - whether marijuana or alcohol - such that Jolley could not safely drive a car."

Finally, Jolley argued that the totality of the circumstances did not support his arrest. Balancing the long stop, which he explained was to defrost his car window, he noted that he had been observed committing no other violations, had been cooperative, and that the video indicated his "speech was distinct and not slurred, that his thinking and reasoning were intact, and that his gait was normal." Refuting the trial court's note that at 50 degrees, the night was not cold, he indicated that he was wearing a "short-sleeved shirt" and was shivering. He also noted that Harvell allowed "Konrad to drive Jolley's automobile away from the scene without first checking Konrad's driver's license and administering field sobriety tests to him."

The Court, however, concluded that there was probable cause to justify the arrest. The Court noted that "Harvell's conduct" was well within the range dictated by Saucier v. Katz,¹⁷² and that "[a]lthough he may have made some mistakes ... he properly found probable cause."

The Court upheld qualified immunity in favor of Harvell.

42 U.S.C. §1983 - FIRST AMENDMENT

Leonard v. Robinson

477 F.3d 347, 2007 Fed.App. 0051P (6th Cir. Mich. 2007)

FACTS: On Oct. 15, 2002, Thomas and Sarah Leonard attended a township board meeting. The Leonards had been involved in a dispute with the Township that resulted in a lawsuit that involved Police Chief Abraham, over a towing contract. Officer Robinson, Montrose PD, was ordered to attend the meeting as well, in the hopes that he might be able to arrest Sarah Leonard.

During a public part of the meeting, Sarah addressed the council about how her business had been affected by their actions. Thomas Leonard was then recognized and spoke, and during his statements, he used a profanity. Officer Robinson then took Leonard outside and charged him with using the obscenity - that citation was later voided and dismissed.

¹⁷² 533 U.S. 194 (2001).

Leonard sued Robinson claiming battery, false arrest and false imprisonment. Robinson demanded qualified immunity and demonstrated the Michigan laws that Leonard allegedly violated. Leonard argued, in turn, a “First Amendment retaliation theory.” The U.S. District Court dismissed the case, finding that Robinson had probable cause to arrest Leonard for statutes that had not yet been specifically found unconstitutional, although other, similar statutes had been. Further, the trial court found that there was no connection between Leonard’s protected speech and his arrest.

Leonard appealed.

ISSUE: May an officer be held liable for charging pursuant to a state statute that had not yet been held to be unconstitutional, when the content of said statute had been addressed by a relevant U.S. Supreme Court decision?

HOLDING: Yes

DISCUSSION: The Court reviewed the Michigan criminal statutes. The Court noted that the U.S. Supreme Court, in Cohen v. California, had ruled that the use of a “single four-letter expletive” could not be a “criminal offense.”¹⁷³ The Court found that “[p]rohibiting Leonard from coupling an expletive to his political speech is clearly unconstitutional.”¹⁷⁴ Further, the Court found that a statute that prohibited disturbances at public meetings was unconstitutionally overbroad.

The Court stated that:

We conclude that the statute is unconstitutional as applied by the district court because the procedural posture of the case permits a finding that Leonard merely advocated an idea. This conclusion is based upon First Amendment jurisprudence that is decades old. In light of this, and of the prominent position that free political speech has in our jurisprudence and in our society, it cannot be seriously contended that any reasonable peace officer, or citizen, for that matter, would believe that mild profanity while peacefully advocating a political position could constitute a criminal act. The facts in this case could lead a reasonable factfinder to conclude that the circumstance of Leonard’s arrest for disturbing the peace were devoid of any indicia of disruption or contention.

Finding that no reasonable officer would consider themselves to have probable cause to ‘arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly. As such it was error for the District Court to grant the officer qualified immunity. Further, the court found that it was possible to find that the arrest was in “retaliation for constitutionally protected conduct.”

The grant of summary judgment was reversed.

¹⁷³ 403 U.S. 15 (1971).

¹⁷⁴ Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Miller v. California, 413 U.S. 15 (1973).

42 U.S.C. §1983 – SPECIAL RELATIONSHIP

Carver v. City of Cincinnati

474 F.3d 283, 2007 Fed.App. 0026P (6th Cir. Ohio 2007)

FACTS: On the day in question, in 2005, Cincinnati police and EMS personnel “responded to a 911 call for a suspected cardiac arrest.” Upon arrival, the EMS crew “found Sandra Smith-Sandusky dead on the floor” and Carver “lying on a couch in the same room.” The police, considering the area a crime scene, cleared everyone out, taking the keys away from a roommate who was present. Carver was either “asleep, unconscious, or passed out.” The officers searched the apartment and found various pill bottles, including one containing Oxycontin.

The responders apparently made no attempt to treat Carver. At some undetermined point, Carver died.

Carver’s estate representative filed suit under 42 U.S.C. 1983, alleging that the responders “knew or should have known that Smith-Sandusky had overdosed” ... and “was in imminent danger because he had also overdosed on drugs.” The named officer defendants requested qualified immunity and summary judgment, but the trial court denied it, “holding that they unreasonably cut off access to medical care for Carver without providing an adequate alternative.” The officers appealed.

ISSUE: May officers be held to be liable for an individual’s death, when they exercised no control over the individual and did not deny anyone else the ability to render aid?

HOLDING: No

DISCUSSION: The Court began by noting that the officers had “no general duty to aid Carver.” There are two exceptions to that general rule – the “custody exception” and the “state created danger exception.”

With regards to custody, the Court noted that the “mere fact that the police exercise control over an environment is alone insufficient to demonstrate that a person is seized.”¹⁷⁵ In addition, the Court “found it persuasive that the state officers were not the cause of [Carver’s] unconscious state.” At no point did the officer place any physical restraint on Carver – “his incapacity ... was self-induced.” As such, the Court agreed that the custody exception was inapplicable.

The Court also agreed that the state-created danger exception did not apply. The Court found that the “officers did not discourage aid to the plaintiff and no one had attempted to rescue or render aid to [Carver].”¹⁷⁶ In particular, the Court noted that there was no allegation that he “died while the officers were inside the apartment with him.”

The Court found that qualified immunity was appropriate for both the police officers and the EMTs and remanded the case to the trial court for further proceedings on that accord.

NOTE: *In a case where the plaintiff’s representative does provide some proof that the officers did prevent or discourage an attempt to render aid by other parties, such as EMS,, the case might be decided differently.*

¹⁷⁵ Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002).

¹⁷⁶ Beck v. Haik, 377 F.3d 624 (6th Cir. 2004).

Hudson, Estate of v. Hudson

475 F.3d 741, 2007 Fed.App. 0039P (6th Cir. Tenn. 2007)

FACTS: Prior to August, 2001. Jennifer Braddock had received “three protective orders against James Hudson, the father of her son, because Hudson repeatedly abused Braddock.” Some time in August, 2001, while the third of those orders was in effect, “Hudson broke into Braddock’s home and threatened her.” Despite a call, the Memphis PD apparently made little to no attempt to locate Hudson. Eventually, however, Hudson was apparently arrested, as the record indicates that he was convicted of various offenses and sentenced to a week in jail. During the next two years, Braddock made several calls for assistance alleging violations of the protective order, but no action was taken. Ultimately, Hudson “broke into her home, killed her and two of her friends, then turned the gun on himself and committed suicide.”

Pamela Davis, Braddock’s mother, filed suit on behalf of Justin Hudson, Braddock’s son with Hudson, against Susan Hudson, James’ sister, the Memphis PD and a number of Memphis officers, alleging federal and state law violations. Two of the officers requested summary judgment based upon qualified immunity, and the District Court denied their motion, finding that “their actions were not discretionary under Tennessee law.” The officers then commenced an interlocutory appeal.

ISSUE: May officers be found liable for failing to take actions on an alleged violation of a protective order?

HOLDING: No

DISCUSSION: The Court reviewed the defense of qualified immunity and noted that officials may assert the defense “in all but the narrow class of circumstances in which they perform ‘ministerial’ functions where the relevant law ‘specif[ies] the precise action that the official may take in each instance,’ thereby eliminating discretion.”¹⁷⁷ The District Court had focused on the “compulsory ‘shall’ in the Tennessee statute” but the Sixth Circuit noted that such “seemingly mandatory statutes ... and police discretion coexist frequently.”¹⁷⁸ The Court pointed out that even such mandatory statutes still require that the officers have probable cause – even noting, in a footnote that “it would be difficult .. to square the Tennessee statute with the Fourth Amendment if it allowed for arrests without probable cause.” As such, the Court held that officers “may avail themselves of the qualified immunity defense” in such cases.

Once the Court concluded that the defense was available, it moved on to considering “whether they are entitled to it.” The Court noted that as a “general principle, state actors cannot be held liable for private acts of violence”¹⁷⁹ However, the Court recognizes “two exceptions to this rule: (1) when the state has a special relationship to the victim, and (2) when the state creates the danger that led to the victim’s harm.”¹⁸⁰ Further cases have illustrated that “a protection order does not create a special relationship between police officers and the individual who petitioned for that order.” The Court agreed, as well, that

¹⁷⁷ Davis v. Scherer, 468 U.S. 183 (1984).

¹⁷⁸ Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).

¹⁷⁹ DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989).

¹⁸⁰ Jones v. Union County, 296 F.3d 417 (6th Cir. 2002).

this case, the plaintiff could not be successful under the “state-created-danger theory” either, as that requires an “affirmative act” by the officers involved.¹⁸¹

The Court mentioned that it had previously addressed the question for Kentucky in Howard v. Bayes, and found that such statutes do not create a “protected property interest under the Due Process Clause.”¹⁸² “Imbuing these restraining orders with constitutional property value, protected by the Due Process Clause, would needlessly interfere with Tennessee’s choice of how to allocate the resources necessary to enforce its domestic violence laws.”

Because the failure to arrest Hudson offended “neither the procedural nor substantive prongs of the Fourteenth Amendment’s Due Process Clause,” the Court found it unnecessary to go to the second step in the Saucier¹⁸³ analysis. The Court reversed the lower court’s denial of summary judgment and remanded the case back to the trial court with instructions to grant the motion.

Koulta v. Merciez

477 F.3d 442, 2007 Fed.App. 0078P, 6th Cir. Mich. 2007

FACTS: At about 3 a.m., on Sept. 13, 2002, “Lucero drove her 1991 Buick through a red light at 63 miles per hour and broadsided Sami Koulta’s” vehicle, fatally injuring Koulta. Lucero was charged with second-degree murder and pled guilty. Later facts in the opinion noted that Officer Merciez and other officers had been called to “an ‘unwanted’ person” – called in by Lucero’s former boyfriend’s mother, as Lucero had arrived, intoxicated, hoping to reconcile with him. Lucero was apparently trying to climb a trellis at the house. The officers ordered Lucero to leave, but “did not cite her for having expired license plates, did not conduct any investigation into her driving record and did not administer a sobriety test.” Lucero finally left, and drove toward a neighboring city and approximately 12 minutes later, was involved in the collision with Koulta. The Sterling Heights officer who responded observed that she “smelled strongly of alcohol, slurred her speech, had red, watery eyes and had urinated on herself.” She was found to have a blood alcohol of .11.

“After learning that several police officers employed by the City of Center Line had confronted Lucero minutes prior to the action,” Lucero’s estate representative filed a lawsuit under 42 U.S.C. §1983 because the officers permitted “the inebriated Lucero to continue to drive.” The trial court denied summary judgment in favor of the defendant officers, and the officers filed appealed.

ISSUE: May officers be found liable for permitting an impaired driver to leave a scene?

HOLDING: No

DISCUSSION: The Court began its analysis by noting that “[a]s with many claims of this type, this one involves equal doses of private-party foolishness, governmental incompetence (assuming, as [it] must, the truth of the allegations) and public anguish.” The Court noted, however, that the government is not required to “protect the life, liberty, and property of its citizens against invasion by private actors.”¹⁸⁴ The

¹⁸¹ Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).

¹⁸² 457 F.3d 568 (6th Cir. 2006).

¹⁸³ Saucier v. Katz, 533 U.S. 194 (2001).

¹⁸⁴ DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989).

Court evaluated the situation under the “state-created danger” theme, and found that the officers took no affirmative acts that placed Koulta in any danger different from that of the general public. The Court agreed that the officers’ actions may have been negligent, but that would not be a federal cause of action. Although the officers allegedly told Lucero to go home, in fact, all they required her to do was leave the property where she was unwanted,” she could have asked them for help in getting home or driven away and stopped, and waited to sober up before continuing to drive. The Court concluded that “Lucero’s admitted proclivity to drink and drive that evening placed Koulta (and other people using the roadways0 in as much danger before the officers arrived as afterwards.” Nothing that the officers did placed Koulta in any special danger from Lucero.

The Court reversed the trial court’s denial of summary judgment.

42 U.S.C. §1983 – PPCT

Griffith v. Coburn

473 F.3d 650 (6th Cir. Ohio 2007)

FACTS: On the day in question, Benton Township (Ohio) officers went to the Partee home to serve a warrant on Arthur Partee. Originally, Partee’s mother had visited the police station, seeking help in handling Arthur, who was “acting strangely.” The officers did not believe that he was a danger to himself, but upon finding that he had an outstanding warrant, they agreed to go and arrest him so that he could be evaluated. Mrs. Partee admitted Officers Bradshaw and Sutherland to her home.

Partee was sitting on the couch, staring at the TV, when they arrived. The officers spoke to him, telling him of the warrant, but he did not respond. The officers moved the coffee table to better reach him and a struggle ensued. Eventually, Partee “lay handcuffed and face down on the ground.” His mother, who was nearby the entire time, feared that he was “in trouble at that point” and “implored the officers to help him.” They initially said that he was “faking” or “playing possum,” but finally turned him over and tried to get a response from him. Realizing he was not breathing, they started CPR and EMS responded. Partee was pronounced dead.

The autopsy indicated that he died from “asphyxia associated with physical restraint.” Another doctor agreed that the cause of death was the “improper application of a neck restraint” that would have to have been maintained for 2-3 minutes.

The officers later detailed the struggle. Sutherland stated that during the fight, he felt Partee’s hand on his holstered gun and that Partee was unable to partially unsnap the holster. Sutherland then used a “vascular neck restraint” for a few seconds and was able to get control of Partee. He also stated that when he realized that Partee was having trouble breathing, the officers initiated appropriate medical care. Bradshaw’s recitation of the facts were essentially the same.

The District Court awarded all defendant officers summary judgment, finding that “the use of the vascular neck restraint under the circumstances was not objectively unreasonable” because it was in response to Partee’s actions.

Partee’s estate administrator appealed.

ISSUE: Is the use of a vascular neck restraint appropriate when the subject does not demonstrate any physical threat to the officers?

HOLDING: No (but see discussion)

DISCUSSION: The Court measured Sutherland's actions:

... in light of testimony regarding the training that he received in use of the neck restraint tactic. Although the Township had no written policy on the use of neck restraints, Officers Sutherland and Bradshaw both completed a police academy program that included certification in "Pressure Point Control Tactics," including neck restraints, taught by a certified instructor. The sole publication used in this training was the statewide standard and had been reviewed and accepted by the Michigan Law Enforcement Training Council, and the instructor had little discretion to stray from this manual. The training pertinent to neck restraints included reading the manual, in-class discussion, and hands-on training. Over several days the students practiced the technique on people of different sizes and in different situations.

The manual instructed students that "vascular neck restraints are justified when the officer's attempt at lower forms of subject-control have failed, or when the officer believes that lower forms of subject control would not be successful," and that the restraint "is designed to control high levels of resistance." The instructor likewise trained students on when "[t]his ... high use of force" is appropriate. The certified trainer explained that the neck restraint is a technique that is to be used in situations such as where someone is being "violent" or assaulting an officer: "You wouldn't use this technique on someone who is just sitting there, and saying I'm not going; I'm not going to leave, you wouldn't use this force on someone who is not attacking you or anything. You're going to use this, again, for someone who is highly agitated, who is violent."

Police tactics are classified along a "force continuum" and, according to the certified instructor, the vascular neck restraint falls toward "the harder or the more violent part" of this continuum, probably beyond pepper spray, at the "point where you are using batons, or ... tasers." Police Chief Coburn attested that he is absolutely certain that Officers Sutherland and Bradshaw had pepper spray on their persons when they arrested Partee and that they additionally should have had night sticks.

As such, the Court continued:

In light of the evidence about the neck restraint's position on the force continuum and the undisputed fact that Partee never actually had possession of Officer Sutherland's gun, let alone threatened anyone with it, we can only conclude that a jury could find Officer Sutherland's use of the neck restraint unreasonable, particularly in light of the mandate "[i]n this circuit ... that a Fourth Amendment seizure must be effectuated with 'the least intrusive means reasonably available.'" ¹⁸⁵

¹⁸⁵ United States v. Sanders, 719 F.2d 882, 887 (6th Cir.1983).

The Court also noted that the officers knew that they were dealing with an individual who was “experiencing some sort of mental or emotional difficulty.” The Court concluded that “it is clear that Partee posed no threat to the officers or anyone else” and that as such, the use of the neck restraint was inappropriate.

The Court found that the grant of summary judgment to Officer Sutherland was inappropriate at this time, reversed it, and remanded the case back for further proceedings.

42 U.S.C. §1983 – ARREST

Boykin v. Van Buren Township

479 F.3d 444, 2007 Fed.App. 0098P (6th Cir. Mich. 2007)

FACTS: On April 12, 2004, Boykin went to a Meijer store in Belleville, Michigan. Through an odd sequence of events, the loss prevention officer believed that Boykin committed a retail fraud involving a drill. (In fact, he did not.) He and a colleague intended to stop Boykins, but were unable to do so before he reached his car. So, they contacted the local PD, Van Buren Township, and reported that they suspected Boykin (the driver of the car) had committed a crime. The officers were able to determine Boykin's address, and Officers Harrison and Hayes went to the Boykin home. Boykin answered the door and the officers explained what they had been told. They verified Boykin's description with the loss prevention officers. Eventually, they told Boykin that he would be arrested.

Boykin told the officers that he was contacting a lawyer, and “instructed his wife to videotape subsequent events.” He maintained his innocence. His wife was allowed to go look for the receipt for the drill. Eventually, however, Boykin “stepped outside and was taken into custody and handcuffed.” The officers took him to the garage, where his wife was still searching. At some point, Boykin learned precisely what he was accused of doing. The officers located the bag which contained two drills, and Boykin told the officers to bring the bag along. They were not, however, able to find the receipt, and eventually, Boykin went along with the officers to go back to the store.

Back at Meijer's, the loss prevention officers confirmed Boykins was the suspect. After much discussion amongst the officers, Boykin realized why they suspected he had committed retail fraud, and he “then explained his actions at the register to Officer Hayes and asked that his story be confirmed with the cashier.” Eventually, the cashier confirmed that Boykins had, in fact, properly purchased two drills. The loss prevention officers apologized, as did Officer Hayes. During the interim, Boykin's wife had arrived. Hayes told him he was free to leave, but Boykin asked him to drive him back home and release him there, so that his neighbors would witness it and realize that he had not actually been arrested.

Boykin claimed he did not explain his actions initially because the officers did not tell him what he was accused of, and when he did realize what had occurred, Boykin claimed, “the officers cut him off every time he attempted to give an explanation.”

Boykin filed sued against the Meijer defendants and the Van Buren Township defendants. He made claims under 42 U.S.C. §1983, against Van Buren Township and its officers, alleging false arrest and imprisonment and assorted other issues. The District Court awarded summary judgment to the Van Buren officers, and Boykin appealed.

ISSUE: May officers take action based upon the statements of loss prevention officers?

HOLDING: Yes

DISCUSSION: The trial court found that the Van Buren officers had probable cause to arrest Boykin, as they were depending upon the information provided to them, through dispatch, from the Meijer loss prevention officers. The Court agreed that it was questionable whether probable cause actually existed, but stated that “this is a question that Meijer and its security guards must answer” and that the “Van Buren Township police officers cannot be held liable - at least not on grounds of unconstitutionally arresting an individual without probable cause - for an error, assuming there was one, wholly attributable to Meijer employees.” In fact, the “officers were relayed first-hand information about a suspect theft at a major local retail store” and they likely “receive[d] such calls with relative frequency and there would have been no reason for them to doubt the veracity of the information they received, especially in light of the facts they were able to corroborate once they spoke with Boykin.”

Because the officers committed no constitutional violation, any claim against the township also failed, and the Court upheld the dismissal of the lawsuit against the government defendants. However, the Court noted that the result might well have been different had Boykin argued his case differently, and had argued instead that an unlawful warrantless arrest occurred at his home, in violation of Payton v. New York.¹⁸⁶ The Court noted that it would have been more appropriate, and legal, for the officers to have gotten a warrant against Boykin. In particular, the Court noted that several statements by the officers indicated that they were prepared to enter Boykin’s home, without his permission and that that constituted a “constructive entry” into the house.

The Court upheld the dismissal of the claims against the officers and Van Buren Township. (The Meijer defendants, however, were kept in the lawsuit, for other reasons.)

Wilson v. Morgan

477 F.3d 326, 67 Fed.R.Serv.3d 283, 2007 Fed.App. 0050P (6th Cir. Tenn. 2007)

FACTS: On Aug. 8, 1998, Officer Walker (Knoxville, Tenn. PD) was dispatched to a disturbance and the Emert residence. He was told by Emert’s son, Mike Blizzard, that an identified woman (Judy Wilson) had fired into the house and left the scene with a male and a female, leaving a bag containing weapons behind. In addition, a handgun was missing. Blizzard provided a license plate number, which came back to a Jeep registered to a “D. Wilson.” The officers went to search for the individuals involved.

The officers spoke to Emert on the phone several times, and he indicated that he might not want to press charges. After getting a call from Judy Hurt (one of the plaintiffs) Emert told Walker to “slow it down.”

At the location where the vehicle was registered, officers initially arrested three people, Brian Davis, Judy Hurt and Donna Wilson, and they did a protective sweep of the house. They were released after questioning, and they found that the house had been searched. They were never charged. (In fact, the person who fired the shots was Hurt’s daughter, Angel Olsen, and Wilson and Davis has simply gone to collect her.)

¹⁸⁶ 445 U.S. 573 (1980)

The three filed suit against a number of parties, including Officer Walker. They claimed that they were “arrested without probable cause in violation of their Fourth Amendment rights.” The magistrate judge dismissed the claims against most of the parties, and the plaintiffs appealed. (It should be noted that neither Lett nor Walker were parties to the appeal, having been dismissed.)

ISSUE: Must officers explore all possible claims in exculpation before taking action on a criminal charge?

HOLDING: No

DISCUSSION: The Court identified the issue in this case as “whether the police have a duty under the federal Constitution to investigate for potentially exculpatory evidence” and noted that it has been “asked and answered” The Court noted that after “the evidence was fully developed ... it was clear that the officers at the Fair Drive location [where the vehicle was registered] did not know the exculpatory evidence known to the officers at Emert’s ... residence.”

The court noted that the information available to the officers “was sufficient to lead a prudent officer to conclude that Wilson and Davis had committed an offense” and that a reasonable juror could only conclude that the officers had probable cause to make the arrests on “any one of several crimes....” Although Officer Walker and Detective Lett came into possession of “potentially exculpatory facts,” there was “no evidence, however, that Lett or Walker shared the allegedly exculpatory evidence with the arresting officers at the Fair Drive location.”

The Plaintiffs argued that “the officers needed to consider the totality of the circumstances, including both inculpatory and exculpatory evidence, before deciding whether there was probable cause to arrest.” However, the Court agreed that “[o]nce probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused.”¹⁸⁷ Further, though, “that while officers cannot ‘turn a blind eye’ to potentially exculpatory evidence in making the initial probable cause determination, officers are not required to believe the plaintiff’s alibi or investigate it before determining that probable cause to arrest exists.” The Court did not find it appropriate, as the plaintiffs argued, to require the officer to “make a separate probable cause determination at each step of the arrest.”

The Court looked separately at the justification for doing an “protective sweep” under Maryland v. Buie,¹⁸⁸ “even though the arrests were made outside of the residence.” The Court noted that there was some indication that there might be someone else in the house. The officers maintained that they had looked only for that which could be seen in plain view, but the plaintiffs argued that “items had been moved, indicating that the officers had exceeded the scope of a plain-view search.” The Court noted that the Sixth Circuit had already “explicitly rejected plaintiffs’ position that an arrest outside a residence renders a protective sweep invalid per se.”¹⁸⁹ Because the officers had reason to believe someone else was in the house, as at least one suspect and one gun were unaccounted for, the Court found that the protective sweep was justified.

¹⁸⁷ See Ahlors v. Schebil, 188 F.3d 365 (6th Cir. 1999).

¹⁸⁸ 494 U.S. 325 (1990).

¹⁸⁹ U.S. v. Colbert, 76 F.3d 773 (6th Cir. 1996).

After addressing a number of other issues, the Court affirmed the trial court's decision.

Willis v. Neal

2007 WL 2616918 (6th Cir. 2007)

FACTS: In 2003, Willis was a Florida pilot and trying to accumulate sufficient flying hours to qualify as a commercial pilot. Another pilot, John Marshall, asked her to go with him on a flight to Dayton, Ohio, and she agreed to do so. On Oct. 7, they boarded the plane, along with two others. Willis thought they were going to Dayton on a business deal, but Marshall knew they were going for a money-laundering deal. In fact, it was an undercover operation involving an informant, McMillon. McMillon and Marshall "had concocted a money laundering scheme involving jewelry and cash, and the exchange was to take place at the Dayton airport." McMillon knew that there would be others in the plane, but he had been assured that they "knew to keep their mouths shut" - and he further knew that Marshall would be armed.

Federal Task Force and local officers met the plane, specifically Chief Huth (Dunlap PD), Sheriff Hitchcock, (Sequatchie County SO), and Sheriff Neal (Rhea County SO), along with other deputies and officers. Prior to the plane's arrival, Smith conducted a briefing and explained what they knew, and divided the officers into two teams - one to secure the people on the plane and the others to do backup and secure the plane itself.

When the plane arrived, Willis, Jack Marshall (John's son) and Robertson went into the terminal, while John Marshall remained on the plane. Sequatchie deputies followed and had them sit down. Some 30 minutes later, Sheriff Hitchcock entered and told Willis and the others to "remove their personal belongings." Some 15 minutes later, an officer entered and ordered them, at gunpoint, to get down. They were permitted to get up some minutes later. They were not told why they were being held. Eventually, they were all taken to the Rhea County jail.

Sheriff Neal was not present until after Willis had been taken away, but his Chief Deputy, Argo, arranged for the transport. (He was assigned to the team that secured the plane.) Chief Huth, also, did not participate directly in Willis's detention.

When she arrived at the jail, her handcuffs were removed but she was leg-shackled. Willis asked repeatedly to use the restroom (which was where she was headed when the plane first landed) but was denied. Finally, after being interviewed, she was permitted to use the restroom and was required to change into a jail uniform. She was not permitted, however, to use the phone. She was apparently charged, but all charges were dismissed in January, 2004.

Willis sued a number of law enforcement officers, including the officers named above, under both 42 U.S.C. §1983, as well as under state law claims. The defendant officers requested summary judgment, and after parsing out the various claims, dismissed everyone but Hitchcock outright, and awarded Hitchcock qualified immunity.

Willis appealed.

ISSUE: May probable cause be developed based upon the collective knowledge of numerous officers?

HOLDING: Yes

DISCUSSION: The Court quickly concluded the Willis's detention and arrest was adequately supported by probable cause. The Court found that "probable cause may be established from the collective knowledge of the police rather than solely from the officer who made the arrest."¹⁹⁰ The court found that since the two federal agents did have sufficient probable cause, that the local officers were justified in following their lead and direction. Since Willis was admittedly the co-pilot in a private plane, and had been identified as Marshall's girlfriend (although apparently she was not), it was reasonable for the officers to conclude that she was a party to the scheme.

The District Court's decision was affirmed.

Logsdon v. Hains/McShane
492 F.3d 334 (6th Cir. 2007)

FACTS: Logsdon was a long-time, active member of the pro-life movement. He engaged in "sidewalk counseling and peaceful protest outside abortion clinics in and around Cincinnati, Ohio." In the past, he had been charged and convicted with criminal trespass, and admitted that he had, on occasion, "crossed the property line of the abortion clinics to communicate with clinic patients and hand them literature."

On Oct. 28, 2003, Logsdon was outside the Cincinnati Women's Services (CWS) clinic. He "hung on a sign on the neighboring property's fence." Apparently a patient complained about the sign and Jackson, a CWS employee, removed the "sign from the fence and 'walked toward the CWS clinic with the intention of destroying it.'" Logsdon demanded the sign be returned, "to no avail." Logsdon "walked onto CWS property and took back his sign from Jackson" and then "promptly return[ed] to the public sidewalk." Jackson called the police.

Officers Hains arrived and arrested Logsdon for criminal trespassing and disorderly conduct. Hains did not have a warrant and did not witness the offense. Further, Officer Hains "refused to listen to a witness's account of the incident, admonishing her to 'tell it to the judge.'" Logsdon took a bench trial, and was acquitted of disorderly conduct, but convicted of criminal trespassing. Upon appeal, his conviction for criminal trespass was overturned, with the appellate court ruling that Logsdon "was privileged to enter CWS property to retrieve his sign."

On June 18, 2004, Logsdon was counseling "clinic patients and protested on the public sidewalk near CWS." He spoke at length with a patient, though the chain link fence – Logsdon was standing in an adjacent public park. CWS complained of trespass and Officer McShane responded, and "placed [Logsdon] under arrest for criminal trespass." Again, the officer was not present and did not witness the alleged offense, and again, did not listen to a witness's account. After several proceedings, Logsdon's case was dismissed.

Logsdon filed suit under 42 U.S.C. 1983 against the two officers. They moved for dismissal, which ultimately the trial court granted. Logsdon appealed.

¹⁹⁰ Collins v. Nagle, 892 F.2d 489 (6th Cir. 1989).

ISSUE: May officers ignore potentially exculpatory evidence when making an arrest?

HOLDING: No

DISCUSSION: The Sixth Circuit discussed the standard for a lawful arrest. An arrest requires that the police have probable cause, and noted, in particular, that an officer “need not ‘investigate independently every claim of innocence.’”¹⁹¹ However, the Court noted, the “initial probable cause determination must be founded on ‘both the inculpatory and exculpatory evidence’ known to the arresting officer.” Further an officer “cannot simply turn a blind eye toward potentially exculpatory evidence.”¹⁹² The Court noted that an officer’s authorization to make a particular arrest depends upon state law. In both cases, the officers refused to listen to a witness at the scene. The Court found the officers “did not act as ‘prudent officer[s]’ and their conclusions cannot be deemed ‘reasonable.’” Instead, “potentially conflicting explanations from these eyewitnesses would have informed [the officers’] probable cause analyses, giving them reason to question the reliability of reports that [Logsdon] had committed criminal trespass.” The Court stated that a “warrantless arrest should follow consideration of the totality of the circumstances reasonably known to the arresting officers.” Officers who are “initially assessing probable cause to arrest may not off-handedly disregard potentially exculpatory information made readily available by witnesses at the scene.” Even assuming that CWS constituted a “reliable source,” the Court found that the officers “deliberately disregarded available evidence, and consequently, failed to reasonably formulate probable cause.”

The Court found that the officers “lacked probable cause to arrest [Logsdon] and, therefore, that they violated [Logsdon’s] Fourth Amendment rights.”

However, that is not the end of the analysis. The Court found that there had “been no sea change in body of law since [Logsdon’s] arrest, and that as such, the officers were not protected by qualified immunity.” The Court reversed the trial court’s dismissal of the Fourth Amendment claims.

Logsdon also alleged that the actions taken against him were in retaliation for his First Amendment protected speech. Logsdon “averred that he engaged in anti-abortion protest and counseling from the public sidewalk and public park adjoining the CWS property, both quintessentially public fora.” The facts, as alleged by Logsdon and essentially undisputed, indicated that each officer “removed [Logsdon] from the public for a, thereby causing him to cease his protest and counseling....” Logsdon put forward a arguable claim that the actions were based upon the content of his speech. The Court found that the “contours of the First Amendment public forum doctrine are sufficiently clear.” If he was arrested because of the content of his speech, the officers “acted in violation of the First Amendment in ways that should have been clear to a reasonable officer.” The Court also reversed the dismissal of Logsdon’s First Amendment claims, but stated, specifically, that it “express[ed] no opinion as to whether [Logsdon] will ultimately succeed on his claim following discovery.”

The Court also reversed the summary judgment on the First Amendment claim.

¹⁹¹ *Gardenshire v. Schubert*, 205 F.3d 303 (6th Cir. 2000).

¹⁹² *Ahlers v. Schebil*, 188 F.3d 365 (6th Cir. 1999); *Fridley v. Hughes*, 291 F.3d 867 (6th Cir. 2002).

Peet/Spencer v. City of Detroit
502 F.3d 557 (6th Cir. 2007)

FACTS: On April 27, 2000, Officers Petersen and Howard (Detroit PD) responded to a shots fired call at a local restaurant. There, they found Byrd, suffering from a gunshot wound that proved to be fatal. Nearby, they found McGlory, shot multiple times in the legs.

That same night, Anderson gave a statement. Anderson was at a gas station near the restaurant when he was robbed. Anderson jumped in his car, and as he was fleeing, he heard two gunshots. He was able to give a description of two black males, including the clothing they were wearing, but could not describe the third person involved. Bracey, who was also robbed that night, had accompanied McGlory to the restaurant, described what had occurred that night, and gave descriptions of three black men. Bracey directed police to a girl who worked at the restaurant, Wilson. She gave a statement about the events that led up to the shooting – she had been sitting outside, with Byrd. She stated that one of the robbers had given her a telephone number earlier that night, and that two of the men had ordered food.

Officers located Spencer using the telephone number they'd been given by Wilson. Although the record does not indicate, the opinion notes that apparently Spencer led them to Peet. Officer Amos collected Peet and told him that he was not under arrest, but “nevertheless handcuffed him and drove him downtown in a police car, despite his protestations and his preference to be driven by family members.”

Peet and Spencer were put into separate line-ups. Wilson identified the pair as the shooter's accomplices. Warrants were obtained for both, and they were held over at a preliminary hearing on first degree murder charges. However, at subsequent line-ups, McGlory and Bracey were unable to identify the pair, or link them to the crime. No fingerprints were found in Byrd's vehicle that matched any of the alleged robbers.

The men were eventually acquitted. They filed suit against the officers, claiming an unlawful arrest, under 42 U.S.C. §1983. The U.S. District Court dismissed the cases against the officers, and Peet and Spencer appealed.

ISSUE: Must officers release a suspect as soon as they have potentially exculpatory evidence?

HOLDING: No

DISCUSSION: The Court found that the “police had probable cause to believe that Spencer had robbed Reed Byrd at Coney Island” given the information he had been provided. “Wilson's eye witness statement is trustworthy information justifying a reasonable belief that” Spencer and Peet were involved in the robbery. The Court agreed that there were minor differences in the descriptions of the robbers, given by the various witnesses, but found that “their differences were minor and are of the sort to be expected when different eye witnesses recollect the same event.”

Spencer argued that “the police had a duty to release him from jail the moment that new, exculpatory evidence came to light.” However, the Court found no authority to support the premise that there is a “court-ordered requirement on police to release suspects the moment sufficiently exculpatory evidence emerges.” The Court found that “[s]uch a rule would give investigators the responsibility to reevaluate probable cause constantly with every additional witness interview and scrap of evidence collected.” Further, the “strength of evidence against a suspect may frequently change.”

As the case was properly decided by the trial court, upholding the probable cause to arrest both Peet and Spencer, the Court found in favor of the City, as well.

42 U.S.C. §1983 – USE OF FORCE

Marvin v. City of Taylor

509 F.3d 234 (6th Cir. Mich. 2007)

FACTS: On July 11, 2004, Marvin was driving from his home to another location. He rear-ended a personal vehicle owned and driven by Commander Helvey, Taylor PD. Helvey was with his wife and four children, on the way home from church. When the two drivers got out of their vehicles, Commander Helvey realized the Marvin was intoxicated, Marvin having admitted as such at the scene. (He did not realize, for some weeks, that Helvey was a police officer.) Officer Miniard arrived in response to a call, and Marvin also stated to him that he was intoxicated. The vehicles were moved off the roadway, to a nearby gas station lot, with Commander Helvey driving Marvin's car. Marvin willingly accompanied Officer Miniard.

Officer Shewchuk arrived, and gave Marvin three FSTs, all of which he failed. Marvin was given a PBT, with a result of 1.72.¹⁹³ Officer Minard then arrested Marvin, and told him to put his arms behind his back, so that he could be handcuffed.

Marvin, who was 78 years old, claimed that he told Officer Minard "that he was physically unable to place his arms behind his back because it was painful to do so." Instead, he placed his hands out to the front. At that point, he stated, the officer told him again to do so, and when Marvin refused, he stated that the officer "grabbed my arm, kicked my leg, knocked me down in the back of the police car, knocked my glasses off, my had, snapped my arm behind my back, and slapped the cuffs on me." This treatment, he alleged, resulted in a broken arm, although the medical evidence actually indicated a different form of damage to his arm, a rupture of a tendon connected to the humerus.¹⁹⁴

Marvin testified that only Officer Minard touched him, although in fact, Commander Helvey admitted he also assisted in the handcuffing.

Upon Marvin's arrival at the jail, the Court noted, "there is extensive video documenting most of [his] experience at the jail, but the parties still dispute[d] what the video actually depict[ed]." The Court noted that:

Ordinarily, in a qualified immunity case such as this, the Court would simply adopt the plaintiff's version of the facts. *See Scott*, 127 S. Ct. at 1775. However, the existence in the record of a videotape capturing the events in question provides an "added wrinkle" to the ordinary situation. *See id.* As will be explained in greater detail below, Marvin's version of the facts captured on video is sometimes blatantly contradicted by the video itself. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 1776.

¹⁹³ More likely, it was .172.

¹⁹⁴ The record indicates no treatment for this condition beyond pain medication.

Accordingly, where Marvin's version of the facts cannot be countenanced based upon what the video shows, this Court will adopt the video as fact rather than Marvin's version. More specifically, this Court will view the events as they unfolded in the light most favorable to Marvin, but never in such a manner that is wholly unsupportable—in the view of any reasonable jury—by the video recording.¹⁹⁵

The appellate court addressed each clip and what it depicted. In several instances, the Court noted that the video clips clearly differed in what was depicted from Marvin's assertions, and in some cases, "Marvin's characterization of the events is clearly refuted by the actual ... video" and "blatantly contradicts Marvin's version of events." Specifically, at one point, Marvin claimed that Officer Shewchuk twisted his "broken right arm" above his head, but the video clearly shows that "the officers' conduct was in direct response to Marvin's aggressive swing [with the arm]." In another instance, although Marvin accused the officers of kicking and punching him, but the video shows only that they dragged him into the holding cell.

Following the jail events, Marvin was taken to the hospital for a blood draw, which showed his BAC was 0.18. He was returned to the jail, and claimed that he asked the EMS personnel for pain medication, which they did not carry.

Marvin was released after two days. Subsequently he filed suit against the officers involved, under 42 U.S.C. §1983, alleging violations of his Fourth, Eighth and Fourteenth Amendment rights. The U.S. District Court granted partial summary judgment, but denied it on the part of the individual officers, finding that "there remained a 'genuine dispute of material fact' as to Marvin's assertions. The defendant officers appealed.

ISSUE: May video be used by officers to refute the statements of the plaintiff in a summary judgment proceeding?

HOLDING: Yes

DISCUSSION: The Court reviewed the standards for qualified immunity. It noted that there were:

...five discrete events that give rise to his claim of excessive force: (1) the scene of the arrest; (2) arrival at the police station sally port; (3) the booking room; (4) outside the cell; and (5) the blood draw at the clinic. The first and fifth events are not documented by video and thus the Court must accept Marvin's version of the events for purposes of summary judgment. The second, third, and fourth events occurred inside the jail and are well documented on video such that, as discussed above, the Court need not accept Marvin's version where that version is blatantly contradicted by the video.

The Court then reviewed each incident in turn.

With respect to the scene of the arrest, the Court noted that the officers "encountered a very drunk elderly man who had just driven his vehicle into the back of a car containing four small children." Even though he was 78 years old and there were three officers at the scene, the Court found that it was "important to keep

¹⁹⁵ The opinion further detailed a number of technical issues with the clips that were submitted, in that the clips, provided to the District Court and that provided to the Sixth Circuit as part of the appellate record bore different file names.

in mind that Marvin's heavy intoxication created a volatile situation." The later video indicated that it took Officers Minard and Shewchuk, and a third officer, to "restrain Marvin when he began struggling with the officers in the booking room." As such, it found, "it does not necessarily follow that Marvin posed little threat to the officers at the scene simply by virtue of his advanced age as contrasted with the officers' youthful brawn." The Court agreed that Marvin was resisting arrest, albeit passively, by refusing Officer Minard's order to place his hands behind his back, and arguably, his "resistance was not so great as to require Officer Minard's allegedly rough treatment."

The Court noted that Marvin's extremely high blood alcohol level, even close to two hours after the arrested, had to be considered. Officer Minard's need to restrain Marvin was clearly supported by Marvin's later actions at the jail, when he was not so restrained. Although the court agreed that "handcuffing an arrestee in an objectively unreasonable manner is a Fourth Amendment violation," that did not necessarily mean that the officers in this case did so. In this situation, given "Marvin's heavily intoxicated state, abusive language, and his resistance to arrest,"¹⁹⁶ the Court found that the officers' actions were appropriate.

Next, the Court addressed the actions at the sallyport. Marvin asserted that Officer Minard pulled him from the car and "pushed him down on the floor." The video, however, "casts strong doubts on Marvin's characterizations." Although Marvin was on the ground at some point, it was only for a few seconds, and the officers then assisted Marvin to his feet and escorted him inside. Again, the officers' actions were supported by the evidence.

The next incident, inside the booking room, "is clearly depicted on video and that video blatantly contradicts Marvin's version of the facts." Instead, the video "shows the two officers, the cadet, and Marvin peacefully coexisting in the booking room at the jail" until Marvin struck out at Officer Minard with his allegedly injured right arm. They continued to struggle as Officer Minard attempted to complete a more thorough search of Marvin's person. The video contradicted Marvin's assertions that he did not provoke the officers' moving his arms in what he claimed were painful ways. As such, the Court found the officers' actions were appropriate.

Another event that occurred at the jail, in which he alleged the two officers "tackled" him, is also "clearly belied by the video itself." The video indicated that Marvin fell to the ground himself, apparently as a result of overbalancing while trying to kick one of the officers, and that the officers simply held him down for some seconds. They did not "ever kick, punch, or hit him." Once again, the Court found the officers' actions to be justified.

The last event, the blood draw, occurred in a location where no video was shot. However, the assertions were that once unhandcuffed, for the hospital personnel to take blood, Marvin again struck out, swinging "his right fist, handcuffs still attached, at Officer Minard's face." (Marvin claimed that his shoulder was hurt by their attempt to remove the handcuff, in that the process caused the officer to "elevate Marvin's hands.") Even Marvin stated that they were simply trying to remove the cuffs, and that the officers were not acting "maliciously or out of spite." The Court stated that "[c]onsidering Marvin's progressively combative nature—from resisting at the scene of the arrest, to trying to hit Officer Minard's hand in the booking room, to kicking at Officer Minard outside the cell, and to punching Officer Minard in the face at the clinic—it cannot be said

¹⁹⁶ The Court contrasted this case with the facts in Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1991)

that the officers' attempt to remove Marvin's handcuffs at the clinic amounted to objectively unreasonable force in violation of the Fourth Amendment."

The Court concluded that in "each discrete event, from the scene of the arrest through the blood draw at the clinic, Marvin ... failed to demonstrate that the officers acted in an objectively unreasonable manner." As such, the Court concluded the officers were entitled to summary judgment on the merits, having simply done nothing unreasonable, and the Court was thus not required to decide on the issue of qualified immunity.

The Court further elected to address the Michigan state law claims under pendent jurisdiction, and dismissed those claims as well.

The decision of the U.S. District Court, regarding the officers, was reversed.

Eggerson v. Hessler

2007 WL 579545, 2007 Fed.App. 0121N (6th Cir. Mich. 2007)

FACTS: In June, 2003, the U.S. Marshal's Office in Grand Rapids, developed information on the location of Leon Dandredge, wanted on multiple parole violations and for whom they had an outstanding warrant. Deputy Marshal Hessler confirmed through multiple sources that Dandredge was in the Muskegon area and that "Dandredge knew he was being sought and was actively eluding arrest." Dandredge actually spoke to Detective Nader, a local police officer, who was looking for him on state charges, and asked if the "feds" were looking for him, which Nader confirmed. Dandredge told Nader "he would turn himself in on a date certain" but he did not do so. Nader informed Hessler of the conversation.

On Aug. 20, 2003, Hessler and Groenveld, his partner, learned that Dandredge might be hiding at his girlfriend's home in Muskegon, and they went to investigate. Henderson, the girlfriend, answered the door and told them that Dandredge was not there, but allowed them to search.

As they entered the basement, Hessler announced their presence loudly, and he drew his weapon. In the dimly lit basement, there was a small laundry room, cluttered with piles of clothing. They did not find Dandredge, but as they were leaving, they became suspicious of an "abnormally large pile of clothing in the laundry room and decided to investigate further." As Hessler "reached for a blanket atop a large pile of clothes" ... "Dandredge bolted upright, lunging upward at Hessler out of the pile of clothing." Fearing that he'd been intentionally ambushed, Hessler "fired one shot at Dandredge" as he stepped backwards. The gunshot struck and killed Dandredge. Dandredge was unarmed.

Eggerson, Dandredge's estate representative, filed suit under a Bivens¹⁹⁷ action, the equivalent for federal officers to an action under 42 U.S.C. §1983. The District Court granted summary judgment for both Groenveld and Hessler. The appeal was filed, however, against Hessler only.

ISSUE: May expert witnesses be used by a plaintiff in a use of force lawsuit to present theories as to what the deceased subject was doing?

HOLDING: No (but see discussion)

¹⁹⁷ Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971);

DISCUSSION: The Court noted the issue was whether there were material facts that “contradict Hessler’s version of events.” In the District Court proceeding, Eggerson had presented two pieces of evidence to refute Hessler’s – that her expert witness had stated that Dandredge was not “violently attacking” Hessler at the time, and Groenveld’s deposition, in which he said that “Dandredge was sitting on his buttocks with his legs straight out in front of him immediately after he was shot.” In addition, there was “blood spatter analysis setting the height of the bloodletting injury at 35 inches” and that contradicted Hessler’s deposition testimony as well. The District Court, however, completely discounted the expert’s affidavit as conclusory and lacking in any “process of reasoning’ or ‘inferential process’ he relied on in making his conclusions.” It also found that the plaintiff had mischaracterized Groenveld’s testimony. Finally, it noted that the plaintiff also theorized from the blood-spatter evidence and that their conclusion was “no more than a theory and does not establish a factual basis for the” theory. The plaintiff only theorized that Dandredge was attempting to surrender and that was “belied by the fact that he never made a sound in response to the marshals’ repeated invitations that he do so.”

The Sixth Circuit viewed the facts in the light most favorable to Dandredge, and concluded that “when Hessler neared Dandredge’s hiding space, Dandredge silently and forcefully bolted upward in a movement that could be perceived as an attack, and that Hessler, reasonably perceiving it as such, fired out of a concern for his own safety.” The Court could not “say that the use of deadly force was unreasonable” and affirmed the decision of the District Court.

Livermore v. Lubelan

476 F.3d 397, 2007 Fed.App. 0056 (6th Cir. Mich. 2007)

FACTS: Crosslin and Rohm operated a campground in Cass County, Michigan, where, it was alleged, they “advocated the legalization of marijuana” and sponsored events “to espouse their views.” Upon receiving complaints about the activities, the sheriff’s department began an investigation. Pursuant to a search warrant, the deputies discovered a marijuana growing operation. After further charges and proceedings, and after failing to appear as ordered in court, on Aug. 31, 2001, the pair “set fire to the outbuildings [at the campground] and barricaded themselves in their residence.” The sheriff’s office called for help from the Michigan State Police (MSP) Emergency Services team “to resolve the standoff.” “Crosslin confronted the arriving police officials armed with a gun and refused them permission to enter his property.”

Later than evening, Crosslin fired upon a news helicopter, as well. The MSP team, commanded by Lt. Ellsworth arrived, along with the FBI, on Sept. 1. On Sept. 3, Crosslin and Peoples, who was apparently with the pair, left the residence and walked to a nearby farm, where “they broke in and stole supplies.” On their way back to the campground, Crosslin was fatally shot by an FBI agent and Peoples was arrested.

In the wee hours of Sept. 4, the MSP team began a negotiation with Rohm, who agreed to surrender at 7 a.m. if he would then be allowed to speak with his son. The negotiator agreed. At about 6 a.m., however, the residence began to burn, apparently set on fire by Rohm. At about 6:30 a.m., Rohm, armed with a rifle, emerged and hid in trees behind the house.

MSP team members Homrich, Bower and Ellsworth approached him in a Light Armored Vehicle (LAV). Because the vehicle was plated with steel, radios did not work inside, so “Homrich and Bower were placed in open hatches in the roof of the LAV, exposed from their mid-torsos to the tops of their heads.” Lt.

Ellsworth “identified himself via a loudspeaker and directed Rohm to surrender....” They could not see Rohm, however, because of the smoke and the predawn darkness.

However, snipers (including Lubelan) nearby were able to see Rohm, and Lubelan “observed Rohm in a crouched or kneeling position, holding his rifle at waist level and turning his torso back and forth as if looking for someone.” He believed that Rohm was “tracking the LAV as it moved.” Believing that Rohm was “pointing his gun toward an exposed officer in the LAV,” Lubelan shot, and fatally wounded, Rohm.

Livermore, Rohm’s mother and estate representative, filed suit against Lubelan, for killing Rohm, and Ellsworth, for “negligently ... creating the circumstances that led to Rohm’s death.” The officers requested summary judgment, and the trial court denied the motion. The officers then filed an interlocutory appeal of the denial.

ISSUE: Is a use of force decision judged on the split-second decisions made by the officers immediately preceding that use of force?

HOLDING: Yes

DISCUSSION: The Court noted that the District court had found certain “issues of fact” that caused them to deny the request for summary judgment. The Court, however, elected to review those facts to establish whether Ellsworth and Lubelan were, in fact, entitled to summary judgment.

With regards to Lubelan, the Court found that he “acted reasonably in firing at Rohm.” The Court noted that Livermore’s expert witness had found that the “first – and ultimately fatal – bullet fired by Sgt. Lubelan hit the rifle stock of Rohm’s gun before entering Rohm’s chest” – thereby proving that Rohm was holding the rifle at the time. Further, the Court noted that despite Livermore’s assertions, her expert did not support her allegation that the Rohm was not an immediate threat to the officers. Sgts. Homrich and Bower had made statements to the effect that they were informed after they left the hatch and went down into the LAV (and were thus protected) that Rohm had been shot – which Livermore asserted meant that the two officers were not at risk when Rohm was shot. The Court stated, however, that the statements “only suggest that [the officers] were inside the LAV when they learned that Rohm had been shot; they are silent as to whether the officers had been exposed at the time Sgt. Lubelan fired at Rohm.”

In addition, the Court agreed that “in determining whether Rohm posed a threat of serious harm at the time he was shot, [it] must focus on Sgt. Lubelan’s perspective.”¹⁹⁸ The Court quickly concurred that “Lubelan had probable cause to believe that Rohm posed a serious threat to the officers in the LAV – particularly Sgt. Homrich – due to his proximity to the LAV while armed with a rifle, his prior violent behavior, and his continued refusal to surrender and face arrest.”

The Court held that Sgt. Lubelan was entitled to qualified immunity and reversed the trial court’s decision.

With regards to Ellsworth, Livermore had presented evidence from a “law enforcement practices expert” that Ellsworth’s orders “were reckless and contributed to the use of excessive force.” The Court noted that

¹⁹⁸ Smith v. Freland, 954 F.2d 343 (6th Cir. 1992), quoting from Graham v. Connor, 490 U.S. 386 (1989);

under Sixth Circuit precedent, the “proper approach” ... “is to view excessive force claims in segments.”¹⁹⁹ The Court noted that under Dickerson v. McClellan:

The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause, and which, if kept within constitutional limits, society praises the officer for causing.²⁰⁰

In “[a]pplying the segmented analysis here,” the Court concluded that “[a]ll of the actions concerning Lt. Ellsworth ... occurred in the hours and minutes leading up to” the shooting, and that “Dickerson instructs [the Court] to focus on the ‘split-second’ judgments made immediately before” the shooting.” As such, the Court reversed the decision denying Lt. Ellsworth summary judgment as well.

The Court also noted that claims under negligence against the officer under Michigan state law were also not supported.

Ontha v. Rutherford County (Tenn.)
2007 WL 776898 (6th Cir. Tenn. 2007)

FACTS: On March 18, 2003, Deputy Emslie was given four warrants for an “Asian male named Tony Kanjanabout.” He was provided with information about Kanjanabout’s place of employment and his vehicle. Deputy Emslie, along with Deputy Morrow, went to an apartment where Kanjanabout might be found. After about a half-hour, they spotted a “white compact car” - similar to the vehicle Kanjanabout was known to drive - arrive. An Asian male, later found to be Ontha, got out. Ontha “appeared to match the description and photograph” of Kanjanabout, and Emslie drove closer to confirm. Ontha got back in the car, and Emslie turned on his lights and “gave a short burst of its siren,” but instead of stopping, Ontha accelerated and pulled out. Eventually, Ontha ended up back in the parking lot.

At the lot, although the precise sequence of events were disputed, apparently Ontha drove in reverse out of the lot. Emslie pursued and although Emslie said he also drove in reverse, eyewitnesses placed the patrol car driving forward in a normal manner, which placed the drivers facing each other. However, Ontha stopped suddenly, and Emslie tried to avoid a collision by braking and swerving. At some point Ontha ended up outside his vehicle, and he was struck by Emslie’s patrol car. (However, another witness testified that Emslie actually chased Ontha, who was on foot.) In any event, Ontha was “pinned between the hood of [Emslie’s] cruiser and [a telephone pole].” Ontha was given emergency medical treatment, but died some hours later.

Ontha’s parents sued the deputies, the sheriff, and the county. The defendants requested summary judgment, based upon qualified immunity.

ISSUE: May a passenger officer be held liable for actions taken by the driver of the vehicle in which they are riding?

¹⁹⁹ Gaddis v. Redford Twp., 364 F.3d 763 (6th Cir. 2004).

²⁰⁰ 101 F.3d 1151 (6th Cir. 1996), quoting from Plakas v. Drinkski, 19 F.3d 1143 (7th Cir. 1994).

HOLDING: No

DISCUSSION: First, the Court looked to the claims against Sheriff Jones as an individual. The Sheriff was not personally involved in the incident, so the only claim against him would have to be premised on supervisory liability. In a claim under 42 U.S.C. §1983, supervisory liability must be based upon actions by the supervisor that “either encouraged the specific incident of misconduct or in some other way directly participated in it.”²⁰¹ Because the agency did not have a specific policy prohibiting striking a running individual with a patrol car, “this lack of training served as implicit authorization” for Emslie’s actions. They did not contend, however, that this was “part of a pattern of comparable violations.” As such, any claims against Sheriff Jones individually must fail.

With regards to Deputy Morrow, there was no dispute that Morrow was simply a passenger in the car that struck Ontha. The Court agreed that he could not be held responsible for Emslie’s actions in driving the car. Even had he recognized what Emslie was going to do, there was no time for Morrow to intervene in the time frame available. The Court did, however, permit the case to go forward on the issue of Morrow’s dragging Ontha to the curb, apparently by the collar, while Ontha was “moaning in pain.” There was “no indication that Ontha faced any danger if he had been left at the side of the road until emergency medical personnel arrived at the scene.”

The Court awarded Morrow partial summary judgment. This case did not address claims made against Deputy Emslie.

Roberts v. Corporal Manigold
2007 WL 1732903 (6th Cir. Mich. 2007)

FACTS: When Roberts brought his children back from a weekend visit, his ex-wife, Parr, became angry with him and struck him with the telephone. Parr used another telephone to call 911 as Roberts left the house. He tried to call his attorney with no success. He called Parr later and found Officer Potts at the house. She instructed him to come back to the house if he wanted to make a statement. When he did so, he found Potts, along with Officers Stricklen and Webb, waiting. He “felt threatened by the officers and attempted to keep his distance from them.” Roberts’ phone rang and he thought it might be his lawyer, so he answered it. “As he answered his phone, he kept walking backward until, fearing for his safety, he turned and ran.”

The officers pursued him on foot, and Stricklen tried to tase him. As Roberts felt the initial shock, he pulled out the prong and continued to run. “After Roberts fell face-down into a snow bank, Webb, a 225-pound former running back at the University of Michigan, a lesser Big 10 power, pinned him by holding his leg on top of Robert’s back.” “Although Webb had Roberts completely pinned, Stricklen repeatedly used her taser on Roberts.” Webb later admitted that “he would have been able to subdue Roberts without Stricklen’s assistance.”

Roberts was charged with domestic assault, but was acquitted. He then sued the City (Birmingham) and the officers for excessive force, under 42 U.S.C. §1983, along with several state law issues. The officers

²⁰¹ Shehee v. Luttrell, 199 F.3d 295 (6th Cir. 1999).

moved for summary judgment, and the District Court dismissed Webb and Potts, but not Stricklen and the City. The remaining defendants appealed.

ISSUE: Is unnecessary use of a TASER a constitutional violation?

HOLDING: Yes

DISCUSSION: The Court reviewed “facts and circumstances of other recent excessive force cases” to “guide [its] inquiry.” The Court concluded that Roberts’ claim, that “Stricklen needlessly used an electroshock weapon on him,” could convince a “reasonable jury”... “ that Stricklen used unnecessary and gratuitous (and thus excessive) force in violation of Roberts’s clearly established Fourth Amendment right.” As such, Stricklen was not entitled to qualified immunity at this stage of the proceedings.

Bougress v. Mattingly
482 F.3d 886 (6th Cir. Ky. 2007)

FACTS: On Jan. 3, 2004, Officer Mattingly (Louisville Metro PD) “was involved in a drug-sting operation” with other officers. They were planning to “stage a drug transaction” in a parking lot of a convenience store. Other officers were monitoring Mattingly both visually and via a wire transmitter. As Mattingly sat in his car, various individuals approached him, offering to sell him narcotics. Among them was Michael Newby. (The Court noted a conflict between what Mattingly stated, that he believed that Newby had a gun because “Newby lifted his shirt up and jumped back from the car window,” a movement he identified as a “security check,” and what his behavior indicated, as he did not use a code word to indicate that “he thought he was in danger.”)

As Mattingly was focused on Newby, other suspects reached into his car and took some of the money Mattingly had visible, and ran away. Mattingly got out of the car, to discover their direction of travel, but he still did not radio any information that indicated he needed help or that Newby was armed. When he got out, however, he saw Newby, nearby, picking up a \$20 bill. Mattingly tried to arrest Newby, and they struggled. Newby broke free and ran directly away from Mattingly, and towards three eyewitnesses sitting in a vehicle and in view of the convenience store manager. Mattingly fired three shots at Newby, striking him all three times in the back. Newby ran around the building and sat down; Mattingly and Officer Thomerson approached him. At no time did Mattingly tell Thomerson that Newby was armed. When another officer approached Newby to handcuff him, again, Mattingly failed to warn that officer of any potential weapons, nor did he do so after Newby struggled during the handcuffing.

Newby died shortly thereafter of his injuries, and was found to be carrying a gun in his waistband.

Newby’s estate representative, his mother, Bougress, filed suit under 42 U.S.C. §1983. Mattingly requested, and was denied, qualified immunity, and he filed an interlocutory appeal with the U.S. Court of Appeals for the Sixth Circuit.

ISSUE: Is simply stating that one feared that a subject had a weapon sufficient to justify shooting that subject as they were running away?

HOLDING: No

DISCUSSION: The Court began its analysis by stated that it was “crucial for the purposes of this inquiry to separate Officer Mattingly’s decision-points and determine whether each of his particular decisions was reasonable.” The Court identified two separate decisions, the decision to arrest Newby and the decision to shoot Newby. The Court quickly found that Mattingly has probable cause to arrest Newby.

The Court next stated that the “question of whether Mattingly’s second decision was reasonable is the nub of this case.” It noted that the “relevant time for the purposes of this inquiry is the moment immediately preceding the shooting” and that the Court “must focus whether Officer Mattingly had probable cause to believe that Newby posed a serious danger to [Mattingly] or to others *while Newby was running away.*” Looking at the facts, as presented, the Court found it “clear that Mattingly did not have probable cause sufficient to open fire.” The Court found that “[t]oo much evidence throws doubt on Mattingly’s bare assertion that he suspected that Newby had a weapon” and that Newby’s only suspected crimes “were dealing crack and physically resisting arrest.”

The Court recognized that Mattingly (or other officers) believing an individual was dealing drugs, and that drug dealers “usually carry guns” was insufficient justification for a use of deadly force. Instead, the Court noted, Mattingly would have needed to provide a “particularized and supported sense of serious danger about a particular confrontation” to justify such a use of deadly force.

Newby’s second alleged crime was “resisting arrest and fleeing the scene.” Again, those actions, “without evidence of the employment or drawing of a deadly weapon, and without evidence of any intention on the suspect’s part to seriously harm the officer” is not enough to justify deadly force. (It would, of course, justify some degree of force.) Mattingly made no attempt to warn Newby that he might shoot, as required when feasible, and “[n]othing indicate[d] that a warning was unfeasible.” Simply, a “suspect’s flight on foot, without more, cannot justify the use of deadly force.”

The Court reviewed a number of cases offered by Newby in support of his actions, but the Court distinguished each from the facts of this case. The Court stated that it must “acknowledge that in challenges to official action, particularly police action in the heat of the moment, courts must be careful to avoid unduly burdening officers’ ability to make split-second decisions.” In addition, “[e]ffective policing requires that courts accord police officers a certain latitude to make mistakes.” In this case, the Court noted, “there seem[ed] to be little doubt that Mattingly was flustered and nervous” and noted that the members of the Court “might well have been nervous in his situation.” However, the “legal standard ... is objective” and “[e]ven a split-second decision, if sufficiently wrong, may not be protected by qualified immunity.”

The Court found that based upon the facts presented, and looking at the situation in the “light most favorable to Bouggess” as the Court is required to do at this state of this type of a proceeding, the Court found that “Mattingly lacked probable cause to believe Newby posed a serious danger to him or to the public.”

Once a constitutional violation is noted, the Court’s “next step is to determine whether the right at issue was clearly established on the date of the shooting.” A rights violation might be excused under qualified

immunity if the actor “reasonably misapprehends the law governing the circumstances.”²⁰² The Court listed the facts as known to Mattingly, stating that Newby was:

1. present at a crack deal;
2. uttered no threatening remarks toward Mattingly or anybody else.
3. never drew a weapon;
4. struggled with Mattingly in order to flee;
5. did not reach for Mattingly’s gun;
6. did not fire Mattingly’s gun at Mattingly’s foot;
7. broke free from Mattingly and ran away, facing away from Mattingly; and
8. was shot three times in the back.

Under the situation as outlined, the Court found that “no reasonable officer could have thought he had probable cause to use deadly force against Newby.”²⁰³ The Court quoted from Tennessee v. Garner, stating that:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.²⁰⁴

The Court recognized that although reasonable minds can differ as to the legality of deadly force in a particular situation, “there are obvious cases in which an officer should have been on notice that his conduct violated constitutional rights, despite the generalized nature of that Court’s pronouncements of constitutional standards.”²⁰⁵

In this case:

Mattingly and Newby struggled, perhaps over a gun, perhaps not. Newby fled, maybe posing a serious risk to Mattingly or to others, maybe not.

²⁰² Malley v. Briggs, 475 U.S. 335 (1986); Brousseau v. Haugen, 543 U.S. 194 (2004).

²⁰³ Tennessee v. Garner, 471 U.S. 1 (1985).

²⁰⁴ Id.

²⁰⁵ Hope v. Pelzer, 536 U.S. 730 (2002) .

Because of the factual disputes, however, the Court found that it could not resolve such doubts on an interlocutory appeal of a denial of qualified immunity. The Court noted that Mattingly's rebuttals to Bougness' arguments "rest[ed] on suppositions - that the gun was drawn during the struggle and that Newby tried to take it from him - that" the Court could not "accept at this state" of the proceeding.

Finally, the Court ruled that Mattingly was not entitled to "state-law official immunity" on the state claims in the case. The allegations suggest that Mattingly "violated clearly established federal constitutional law and thus were taken in bad faith" and that was sufficient to deny such immunity at this stage.

The Court upheld the denial of qualified immunity and request for summary judgment, and remanded the case for continued proceedings.

Lewis v. Adams County
2007 WL 1228644 (6th Cir. Ohio 2007)

FACTS: On July 9, 2002, at about 7:30 a.m., Lewis drove to Copher's house, a short distance from Lewis' home, and asked Copher to make a telephone call to Lewis' employer and "to tell them that he would not be at work that day." He also told Copher that he and his wife were getting a divorce. Instead of calling, however, Copher delivered the message personally while he was doing errands in town. He returned to his home and at about noon, Copher "showed up again."

When Copher came outside, Lewis told Copher to call 911 and report that he had shot people who were moving "stuff" out of his house. Copher understood that one of the person that was shot was Copher's wife, Teresa. Copher later testified that Lewis's "eyes were red and his speech was like he had done it." Lewis left, "telling Copher that he was going back to his house." Copher watched him turn in that direction.

Lewis called 911:

Copher: Yes ma'am my name is David Copher and Everett Lewis just cam[e] up here and said that he has 2 victims uh 2 victims up there where he lives at I guess he shot 'em or somethin.

Dispatcher: Two victims?

Copher: That's what he told me to say.

Dispatcher: What's his name?

Copher: Everett Lewis lives out there on Barrackman Road.

...

Dispatcher: He shot 'em

Copher: He said he did, he told me not to come up near the truck.

Dispatcher: Where's he at now?

Copher: He just left, he's driving an orange and white Dodge pick up truck, looks like (I can't make it out) but I don't know. He's been going through a divorce type thing.

Dispatcher: Ok did he say he was going back to the ...

Copher: He said he was going to try to work something out. I don't know what he's going to do. He's driving slow so apparently he's going back up there. I don't know, he shot 'em I guess. I don't know what to do go over there or stay here.

...

Dispatcher: Sir, did he go back toward his house or which way did he go?

Copher: Yeah he said he was going back toward his house so he just told me to call 911.
Dispatcher: You don't happen to know his phone number or anything else do ya?
Copher: His phone been disconnected.
Dispatcher: Disconnected.
Copher: I let him use my phone yesterday to call the Sheriff he said something about getting a restraining order.
Dispatcher: Ok, and did he say who he shot?
Copher: He didn't say anything he just said he had two victims laying on the ground so I don't know what . . .
Dispatcher: Ok we'll get somebody right up there.

After receiving Copher's call, the dispatcher immediately alerted the police and officers were sent to Lewis's house to investigate.

Copher then had a second conversation with a 911 dispatcher that was not transcribed. During that conversation, Lewis reappeared at Copher's house. He asked Copher whether he had called 911 and whether the police were coming. He also told Copher that he had hostages in his house, and he warned Copher that no one should come within 100 yards of the house. Lewis was yelling, appeared to have been drinking, and appeared "mad at something." Although the dispatcher could not understand exactly what Lewis was saying, she could hear that he "was agitated" and sounded angry. Lewis then left again. As he left, the wheels on his truck were spinning and throwing gravel. Copher relayed to the 911 dispatcher that Lewis had told him there were three hostages in the house and that no one should come within 100 yards of the house.

At approximately 1:05 p.m. Copher had his third conversation with a 911 dispatcher, during which the following exchange occurred:

Copher: The first time he showed up he was kinda calm about it. The second time he was kinda pissed so apparently he said he's got three of them in the house.
Dispatcher: Adams County to 14 be advised he had stated that there was three at the house.
(background noise)
Dispatcher: These were the three victims or just three people?
Copher: The first time he said there's two victims in the yard.
Dispatcher: Two in the yard?
Copher: and I said what happened he said I shot 'em
Dispatcher: Ok hang on
Copher: Then he said, he came back the second time and said I've got three of them in the house and anybody who comes within 100 yards I'm gonna shoot 'em.
Dispatcher: Ok hang on one second . . . Adams County to 14
14 - 14
Dispatcher: Be advised there was two in the yard shot and then he comes back and the guy said three in the house.
(Background noise)
Dispatcher: Be advised he had three in the house this is from the 911 caller.
Dispatcher: 100 yards

Copher: He said don't come ya know once your in the driveway or get up in the driveway or apparently he can get a shot out I don't know.

Dispatcher: Ok but how far is that?

Copher: Well he said don't come within 100 yards of the house.

Dispatcher: Ok . . . Adams County to 14 be advised 100 yards of the residence.

Copher: He has guns there he's a deer hunter.

Dispatcher: He has several guns.

Copher: Uh I know he's I've heard a shot gun that he had. I don't know what he shot 'em with but I was in the house so he does deer (noise)

Dispatcher: Yeah but he does have weapons, he is a hunter. He does have weapons. He is a hunter.

. . . .

After each call, dispatch relayed the information given to the responding officers. After one call, Detective McCarty told dispatch to roll the Special Response Team. Eventually a total of seven officers responded, included the Sheriff. Dep. Sheeley arrived first, and waited, as instructed, for fellow deputies to arrive, and as he did so, he "saw Lewis's orange pickup truck approaching from the other direction, turn into the driveway and head toward the house" although, because of a rise, Sheeley could not see the house itself. As additional officers arrived, Sheeley attempted to find a point "from which to observe the Lewis property." Although he could see part of the scene, he could not see the yard, but he did observe Lewis come out, get into his truck, do "donuts" in the yard and drive through the road where the officers were waiting. Sheeley radioed this information as he "headed back there himself."

Lewis came within sight of the officers and stopped, and "began yelling at the officers." However, they could not understand him. He reached back "into the truck and pulled out a rifle and pointed it at the officers through the driver's door window." They ordered him to drop the weapon, but instead, he got back in and "began backing up rapidly toward his house." Four of the deputies pursued him back up the driveway, and when they caught up to him, he was already out of the truck. He held his rifle low, pointing it toward the vehicle and sidestepped rapidly towards the porch. The deputies continued to order him to put the weapon down, but he ignored them.

At this point, the deputies later testified, Lewis got to the porch and tried to enter, and "then stopped and aimed his rifle directly at the officers." (The plaintiff, Lewis's estate representative, argued that "whether or not Lewis was actually on the porch when he was shot, and whether or not Lewis was actually his rifle at the officers at the time he was trying to enter the house, are disputed facts.")

Immediately, all four deputies "fired (virtually simultaneously) at Lewis." As Lewis went down, Dep. Cooley "ran up onto the porch and moved Lewis away from his gun, while another officer took possession of the gun." Deputies entered the house looking for hostages and/or shooting victims, but found no one.

The autopsy indicated that Lewis was shot twice, with the "fatal gunshot wound . . . from back to front, right to left, and slightly downward, with the entrance in the right lateral chest and the projectile" remaining in the left side of his chest. The other gunshot was to the left buttock and the trajectory was essentially level.

The estate representative sued, arguing that the fatal shooting violated Lewis's rights. Six Adams County law enforcement officers, including the Sheriff, were sued along with other government entities, and all of

the officers requested summary judgment. The Court dismissed the federal claims and the state claims without prejudice. The estate appealed.

ISSUE: Is great deference given by the court to an officer's on-the-spot judgment at a scene?

HOLDING: Yes

DISCUSSION: The Court stated by noting that "[u]nder the Fourth Amendment, 'the reasonableness of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out.'" In addition, the Court found that "[t]he reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regards to their underlying intent or motivation."²⁰⁶ Finally, "[t]he reasonableness inquiry 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'"

The Sixth Circuit, in Burchett v. Keifer, also stated that the "standard contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case"²⁰⁷and, of course, "must be judged from the perspective of a reasonable police officer on the scene."

"Certain specific rules apply" to a use of deadly force, and it is "only constitutionally permissible if 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others....'"²⁰⁸

The estate argued that the District Court ignored conflicting evidence as to how Lewis died, and as such, its decision was improper. The Court noted that the forensic expert opined "that the physical evidence in the case was not consistent with the individual officers' statements as to how the shooting occurred." The expert, Dehus, stated that:

For Mr. Lewis's wounds to have occurred while he was standing on the front porch, he would had to have been facing the northwest corner of the porch at the time they[sic] side wound was inflicted and would had to have been facing the front door at the time the wound to the buttocks was inflicted. Therefore, his back would have been towards the officers based upon their reported locations and the location of the fired cartridge casings. Diagram # 1 shows the probable trajectory of the bullet that struck Mr. Lewis in the right side and his position at the time of that shot. Diagram # 2 shows the probable trajectory of the bullet that struck Mr. Lewis in the left buttocks and his position at the time he was struck by that bullet. Considering these positions, it is the opinion of this examiner that it is highly unlikely that Mr. Lewis could have been pointing the rifle at the deputies at the time that they discharged their weapons.

²⁰⁶ Graham v. Connor, 490 U.S. 386 (1989); Tennessee v. Garner, 471 U.S. 1 (1985); St. John v. Hickey, 411 F.3d 762 (6th Cir. 2005).

²⁰⁷ 310 F.3d 937 (6th Cir. 2002).

²⁰⁸ Graham; see also Sample v. Bailey, 409 F.3d 689 (6th Cir. 2005).

He further stated that from the trajectory, Lewis was either not actually on the porch, as the deputies claimed, or that the “deputies were firing from an extremely high position.”

The Court discussed whether Dehus’s statement raised a genuine issue of fact that could not be resolved by summary judgment. First, they addressed the argument as to whether Lewis was completely turned to face the deputies when they fired at him. The Court mentioned two problems with the estate’s argument - that nowhere did the deputies actually claim Lewis was facing them, only that “the upper portion of his body was turned toward them.” Thus, the Court found no conflict in this evidence.

Next the Court looked as to whether there was any conflict in the assertion that Lewis was pointing his rifle at the deputies when they fired. The Court noted although Dehus stated otherwise, the testimony of the four officers, with the corroboration by the medical examiner, upheld their assertion that Lewis was, in fact, pointing the gun at him. “One expert’s opinion that it is ‘highly unlikely’ that Lewis was pointing his rifle at the officers in the face of the consistent deposition testimony from all of the officers at the scene and the opinion of the medical examiner that the physical evidence was consistent with the officers’ testimony is simply not enough to take the issue to the jury.”²⁰⁹

Finally, the Court looked at the estate’s assertion that Lewis was not actually on the porch when shot. It noted that “[g]iven that all of the blood was on the porch, [it] did not see how a reasonable jury could conclude that Lewis was not himself on the porch at the time he was shot.”

Finally, the estate faulted the trial court for not crediting its two assertions - that the individual officers’ failure to “verify, in her words, the ‘preposterous’ telephone calls by David Copher” and the “‘indiscriminate’ shooting into Lewis’s residence” - should be found in its favor. The estate claimed that the “‘ludicrous’ phone calls” were “from a paranoid schizophrenic” but the Court noted that there was simply no evidence that the responders had any reason to know of Copher’s alleged mental condition if, in fact, it even existed.

The estate also argued that “her police practices expert, Ken Katsaris” had given the opinion that the failure to verify the call made the use of force “unquestionably objectively unreasonable and excessive,” but the Court noted that “an expert opinion that merely expresses a legal conclusion is properly ignored.”

Next, the estate argued that the physical evidence of bullet damage through the windows of the house negated the deputies’ stated belief that there were hostages in the house, and that it was unlawful to use deadly force to prevent Lewis from entering his house when they believed there were no hostages. The Court noted that the jury would have to “believe that all of the officers were lying and that they simultaneously and without conversation all knew that there weren’t any hostages but decided to fire anyway” and that “to infer from the bullet locations that the officers were shooting indiscriminately and, therefore, that they didn’t really believe that there were hostages inside, is simply not a reasonable inference given the other evidence in the record.”

In conclusion, the court reviewed what the deputies knew at the time and found that “taking the uncontroversial facts as stated by the district court and drawing all plausible inferences in the plaintiff’s favor, whether the shooting was objectively reasonable,” there was sufficient cause for the deputies to objectively believe that the deputies’ actions were appropriate. The Court affirmed the trial court’s grant of summary judgment.

²⁰⁹ Demerrell v. City of Cheboygan, 206 Fed. Appx. 418 (6th Cir. 2006); Boyd v. Baeppler, 215 F.3d 594 (6th Cir. 2000).

Cabaniss v. City of Riverside
231 Fed.Appx. 407 (6th Cir. Ohio 2007)

FACTS: On May 21, 2004, Cabaniss was visiting a friend, Fugate. During the visit, Cabaniss become extremely intoxicated, began vomiting and became belligerent and destructive. Fugate took him outside to sober up, but Cabaniss then went to a neighbor's house and continued his destructive behavior. His behavior became more erratic and disruptive and a neighbor called 911.

Officer Crane, arriving first, found Cabaniss on the ground, "acting agitated," and asked Fugate if Cabaniss was diabetic. Fugate explained what had happened, and the neighbors also contributed information, saying, variously, that Cabaniss had "freaked out" and "was kind of a space cadDetective" Officers Naff and Carlton arrived. One asked if Cabaniss was suicidal, and Fugate related that he had "jumped out of cars" in the past and that he was "probably suicidal." The officers tried to question Cabaniss, but he was unresponsive and began to spit at the officers as they tried to assist him. Carlton threatened to "kick his teeth in" if he did so again, and after he did, in fact, spit at them, the officers handcuffed Cabaniss and arrested him for Disorderly Conduct. As they walked Cabaniss to the car, he continued to spit and threaten the officers verbally.

Cabaniss did not cooperate when placed in the vehicle and after struggling with him, the officers gave up trying to seat belt him in. When EMS personnel arrived, Cabaniss was evaluated by a paramedic, Kronenberger. Cabaniss threatened Kronenberger (and his family) verbally and refused to permit the paramedic to touch him. Based upon Cabaniss smelling "strongly of alcohol," Kronenberger "assumed Cabaniss' behavior was due to extreme intoxication." Cabaniss was returned to the car and Kronenberger questioned bystanders about what had occurred. He was told, by someone, that Cabaniss had a "mental problem" - but he did not interpret that as meaning that Cabaniss was "actually mentally unwell."

At one point, Carlton retrieved Cabaniss' ID and challenged Cabaniss' claim that he'd been in Vietnam, as he was born in 1960. Cabaniss began kicking in the back seat of the car, which Carlton initially ignored. However, it was soon pointed out by another officer that Cabaniss' actions were damaging the prisoner shield and that it was beginning to crack. Carlton warned Cabaniss that he would spray him with OC if he did not stop. When Cabaniss did not stop, Carlton sprayed him. He then drove Cabaniss to the nearby station to decontaminate him. There Carlton was assisted by Crane and Naff, using a hose to rinse off the residue, and Cabaniss told them that the "water had been soothing and he was feeling better." He asked to stand up outside the cruiser, was told not to do so, but then did it anyway. He "fell down in the process" and Carlton was too slow to catch him. "Cabaniss fell to the ground and hit his head on the concrete."

Crane summoned Kronenberger, who was also at the station. Kronenberger treated Cabaniss and he was transported to the hospital, but he eventually died from his head injury.

Cabaniss' estate representative filed suit against the officers and the EMS personnel, claiming excessive force, failure to train and deliberate indifference, among other matters. The U.S. District Court dismissed all of the claims under summary judgment. The estate representative appealed.

ISSUE: Are officers legally responsible for an accidental injury sustained by a person under arrest?

HOLDING: No

DISCUSSION: The Sixth Circuit first analyzed the excessive force claim, which was further broken down by the use of the pepper spray and then the use of the water hose. The Court noted that as a “general rule,” it had “held that the use of pepper spray is excessive force when the detainee ‘surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else.’” The “logical corollary” to this, however, is that pepper spray may be appropriate when the subject is acting in such ways. Given the uncontested facts, that Cabaniss was unsecured in the back seat and banging his head on the shield, and combined with the information that suggested he might be suicidal, the Court found that “Carlton had every reason to fear that Cabaniss posed a real threat to [at least] his own safety and needed to be subdued.” The Court further noted that the claim regarding the water hose was without merit as there was no indication it was used with force and that there was even a suggestion that Cabaniss enjoyed it.

Next, the Court discussed the allegation that the officers were deliberately indifferent to Cabaniss’ medical needs. It noted that the claim was actually “not entirely clear,” but concluded that the claim was that the officers and the paramedics knew that he was intoxicated and potentially suicidal and let him fall. However, the Court stated, his intoxicated state was not the proximate cause of his death, but instead, he “died as a result of an accident that may have been facilitated by his intoxication.” Further “Cabaniss would not have suffered his fatal fall but for the fact that he acted contrary to the warnings of Defendants, which relieves them of responsibility for being the proximate cause of his death.” Once he fell, the officers sought immediate medical assistance. The Court interpreted the claim as that the officers failed “to properly monitor a detainee who they knew to have exhibited suicidal tendencies,” but the Court required that required more than “simply failing to adequately protect a detainee while exerting one’s best efforts to do so.”

Finally, the Court addressed the failure to claim allegation against the City of Riverside. The Court found no constitutional issues on the part of the individual officers and as such “if the agents of a municipality have violated no constitutional right, the municipality can never be liable under §1983 for a failure to train.”

The Court upheld all of the dismissal of the claims against the defendant officers and the City of Riverside under both state and federal law.

Summerland v. County of Livingston (Michigan)
240 Fed.Appx. 70, 2007 WL 2426463 (6th Cir. Mich. 2007)

FACTS: On Oct. 5, 2002, at approximately 6:30 p.m., Deps. Smyth and Marino (Livingston County SO, Mich) “responded to a 911 call that a man placed a large sign in his front yard that read “no police you be shot.” Dep. Smyth first stated he would not go, not believing it to be a “police matter” – but Sgt. Williams told him “that there was a mentally disturbed individual living on the property” and that Smyth needed to go check on his status and intentions.

When the deputies arrived, they found Rinesmith in the window of his mobile home. Smyth tried to enter the property by unwinding a chain around the gate, but “Rinesmith began yelling from his window for the officers to stay out of his yard.” Smyth retreated.

Dep. Marino contacted Rinesmith, by phone, and he complained about being beaten up by two Livingston County deputies two weeks earlier, when he was taken for psychiatric treatment. He agreed to toss the information for his psychiatrist to Marino, who passed it to Symth to try to contact. Over the next hour,

more deputies arrived, including Dept. King, “whose presence profoundly agitated Rinesmith.” (He thought Dep. King had been the one that handcuffed him two weeks before.) Rinesmith tossed his cell phone out, terminating communication, and moved out of sight.

A short time later, Rinesmith returned to the window with what appeared to be a gun.²¹⁰ Dep. Marino took cover. Another deputy, Novara, also believed Rinesmith had a gun. About 7:30 p.m., Rinesmith came out of the mobile home with what appeared to be a handgun. Novara yelled “gun” to alert the other deputies, as Rinesmith moved away from them. Dep. King, who was now in that area, yelled “Livingston County Sheriff’s Department.” Rinesmith turned toward King and took up a “kneeling stance.” King and others, including a neighbor, later testified that they all thought Rinesmith had a gun.

King ordered Rinesmith to “drop the object” and Rinesmith told them to “shoot him.” He sat down and laid an object on the ground that appeared to be a small wooden shovel, but King stated that he did not think it was the same object that he believed to be a gun.

Dep. Smyth finally got Dr. Wang, the psychiatrist, on the phone and they tried to get Rinesmith to talk to him. Rinesmith had gotten up, and moved in the direction where Marino and Novara were standing. One witness testified that Dep. Smyth was chasing Rinesmith, and that his “hands were together as if he were holding a gun” and that he was going to “shoot the officers.” However, Dep. Marino and Novara stated that Rinesmith charged them with what appeared to be an axe, not a gun. Dep. Marino yelled at him to stop and drop it, and then fired twice. Dep. Novara also fired twice at him. “Rinesmith was not given any verbal warning that deadly force would be used.” Dep. King did not see the shooting, but he testified that he heard the commands.

After Rinesmith was shot, Deps. Marino and Novara approached him and moved three objects away from him – a shovel, a metal L-shaped bracket and a plastic framing square. They testified that they turned his body over and that he was breathing. They called EMS but did not render first aid. (King, at least, had first aid training and had some supplies in his car, but stated that he did not believe that first aid would have helped.) Rinesmith died on the scene.

Summerland filed suit on behalf of Rinesmith’s estate, against the County and the deputies involved, on a variety of claims, including those under 42 USC §1983. The deputies moved for, and received, summary judgment under qualified immunity. She appealed.

ISSUE: Is the fact that an armed individual is mentally ill a factor in making a deadly force decision?

HOLDING: No

DISCUSSION: The Court first addressed the excessive force claim against Dep. Novara and Dep. Marino. Under the qualified immunity standard, the Court must first consider whether the facts indicate that a constitutional violation occurred. There was no dispute that Rinesmith was “seized” under the Fourth Amendment when he was shot. As such, the Court had to decide if their use of force was objectively reasonable. To be reasonable, the suspect must have posed a “threat of serious physical harm, either to the officer or to others.” The estate representative argued that Rinesmith was simply running from Dep.

²¹⁰ Most of the facts from this point come from a neighbor who videotaped the events.

Smyth, when he was shot by the other deputies. Dep. Smyth, however, denied this, contending that he was still talking to Dr. Wang when the shots were fired.

The Court agreed that this was a disputed fact, but held that it was not a material fact. The Court found that either way, Rinesmith posed a threat to Novara and Marino, no matter whether he was believed to be holding a gun or an axe. Summerland argued that because Marino was about 24 feet from Rinesmith, and Novara approximately 35 feet, when the shots were fired, that Rinesmith could not have posed a threat to them with the axe. The Court, however, noted that Rinesmith had already demonstrated aggression by his actions, by brandishing what appeared to be a shotgun, and by charging towards the deputies. As such, they had to make a “split-second judgment” – and “faced all this in the dark.”

The Court further noted that the deputies lacked any “probable cause to arrest Rinesmith for any crime.” “Yet,” the Court stated, “it is unclear why this matters.” Even if that was true, “this would not have given Rinesmith a free pass to threaten the deputies with ‘serious physical harm.’”

Summerland was correct in stating that “[t]he diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted.” “Notably,” the Court stated, the cases quoted by Summerland “involved mentally disturbed individuals who were unarmed.” In contrast, “Rinesmith ... was armed with (and aiming) what the deputies perceived to be an axe and witnesses perceived as a gun.” Unfortunately, “Rinesmith’s diminished capacity did not make him any less of a serious threat to the deputies in light of these other circumstances.”²¹¹

Finally, she argued that the deputies failed to warn Rinesmith that they would use deadly force against him. They ordered him to stop and displayed weapons, “giving Rinesmith a definite (though not verbal) warning of the probable result.”²¹²

The Court concluded that the shooting was justified because Rinesmith posed a serious threat to the deputies. As such, it was unnecessary to move to the second prong in the analysis, and the Court found that the case was properly dismissed.

The Court elected to discuss the state negligence claims. Summerland argued that King’s “failure to notify the other deputies that Rinesmith was unarmed is clearly reckless in light of the circumstances present that evening.” In fact, the Court found no evidence that King did know that, and as such, could not be responsible for not sharing the information.

Finally, Summerland argued that “Livingston County provided inadequate training to the deputies in apprehending mentally disturbed individuals.” The Court found no evidence that supported the claim, however.

The Court affirmed the District Court’s decision.

²¹¹ Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005).

²¹² Rhodes v. McDannel, 945 F.2d 117 (6th Cir. 1991).

Williams v. City of Grosse Pointe Park
496 F.3d 482 (6th Cir. Mich. 2007)

FACTS: On Aug 17, 2003, Officer Miller and Sgt. Hoshaw (Grosse Pointe Park PD) learned of a “citizen report that three individuals in a green Dodge Shadow were tampering with cars.” The officers located a vehicle matching the description, driven by Williams and containing two other occupants. They pursued the vehicle, and at about 7:14 p.m., “Hoshaw positioned his cruiser in front of the Shadow in order to block its path, while Miller’s cruiser continued to approach from the rear.”²¹³ In trying to escape, Williams backed the Shadow into Miller’s cruiser. At the same time, Hoshaw had approached the car and “stuck his gun in the driver’s side window, pointing his weapon at Williams’s head.” Williams again attempted to flee, accelerating and navigating around Hoshaw’s cruiser, by driving over the curb and onto the sidewalk. Since Hoshaw was still holding onto the vehicle in some way, he was knocked down. Miller fired several rounds at the car, striking Williams in the back of the neck and leaving him paralyzed. Less than 60 seconds elapsed from the time Hoshaw stopped in front of the cruiser and the point that Miller fired.

Williams filed suit under 42 U.S.C. §1983, contending a violation of his Fourth Amendment rights. The U.S. District Court awarded summary judgment to Miller and the city, finding that there was no violation, and Williams appealed.

ISSUE: Is deadly force appropriate against someone who appears to be driving a vehicle in an aggressive manner?

HOLDING: Yes

DISCUSSION: The Court began its discussion as it must always do so in cases of this nature, by examining “whether, after considering the facts in the light most favorable to [Williams], a rational jury could find that Miller’s use of deadly force against Williams was objectively unreasonable.” The Court looked to the recent case of Brousseau v. Haugen for the standard, quoting that:

... [T]he constitutional question . . . is governed by the principles enunciated in Tennessee v. Garner and Graham v. Connor. These cases establish that claims of excessive force are to be judged under the Fourth Amendment’s “objective reasonableness” standard. Specifically with regard to deadly force, we explained in Garner that it is unreasonable for an officer to “seize an unarmed, nondangerous suspect by shooting him dead.” But “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”²¹⁴

Further, the Court quoted from Graham v. Conner, in that “[t]he ‘reasonableness’ of a particular use of force must be judged from perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”²¹⁵ The Court stated that “[t]his determination should also be made “in light of the facts

²¹³ Most of the factual information as to what occurred was gained from the video camera in Miller’s cruiser. Later in the opinion, the Court notes that the times indicated by the camera, while apparently slightly out of sync with the actual time, would be what they would use to describe the sequence of the events.

²¹⁴ 543 U.S. 194 (2004).

²¹⁵ 490 U.S. 386 (1989).

and circumstances confronting [the officers], without regard to their underlying intent or motivation.” The Court agreed that it was “not for the court to substitute its own personal notion of the appropriate procedure for those decisions made by police officers in the face of rapidly changing circumstances.”²¹⁶ Quoting from the Freland case, the Court noted that “[w]hat constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.” The Court found the “mandate in Graham to be quite clear:

... [t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Further:

The reasonableness of a particular use of force “requires careful attention to the facts and circumstances of each particular case, including:” (1) “the severity of the crime at issue,” (2) the immediacy of the threat posed by the suspect to the officers or others, and (3) whether the suspect is “actively resisting arrest or attempting to evade arrest by flight.

Looking to the facts of the case at bar, the Court noted that “

At the point Miller fired his weapon, he was faced with a difficult choice: (1) use deadly force to apprehend a suspect who had demonstrated a willingness to risk the injury of others in order to escape; or (2) allow Williams to flee, give chase, and take the chance that Williams would further injure Sgt. Hoshaw or an innocent civilian in his efforts to avoid capture. Moreover, Miller had only an instant in which to settle on a course of action. Under the circumstances, we cannot say that Miller acted unreasonably, nor do we believe that a rational juror could conclude otherwise.

Looking at the situation from Miller’s perspective the Court found that:

From Miller’s perspective, Williams: (1) was undeterred by having a weapon pointed at his head; (2) acted without regard for Hoshaw’s safety; (3) was obviously intent on escape; and (4) was willing to risk the safety of officers, pedestrians, and other drivers in order to evade capture. Miller had no way of knowing whether Williams might reverse the Shadow, possibly backing over Hoshaw, or cause injury to other drivers or pedestrians in the area. As a consequence, Miller elected to fire his weapon in order to prevent Williams’s potentially causing someone injury. That Williams may not have *intended* to injure Hoshaw or anyone else is immaterial. From Miller’s viewpoint, Williams was a danger, and he acted accordingly. Turning to the factors identified in Graham, Williams was suspected of car theft, a felony. Hoshaw, having been knocked to the ground, was in immediate danger from the Shadow. While there are no pedestrians or vehicles in the immediate field of view of the camera in Miller’s cruiser there can be no question that Williams’s reckless disregard for the safety of those around him in attempting to escape posed a threat to anyone within the vicinity. Finally, Williams was actively avoiding arrest, apparently doing all he could to

²¹⁶ Smith v. Freland, 954 F.2d 343 (6th Cir. 1992).

evade capture by the police. While the suspected crime was a nonviolent property offense, the immediate threat Williams posed to Hoshaw and other drivers and pedestrians and the fact that Williams elected to flee both suggest that Miller's chosen use of force to apprehend Williams was reasonable.

The Court stated that previous cases in the Circuit had held that officers who reasonably believe, "in the face of a rapidly unfolding situation," that a "suspect poses a serious physical threat either to the police or members of the public" may use deadly force.²¹⁷

In a strong dissent, longer than the prevailing opinion, dissenting justices noted that Sgt. Hoshaw agreed that there was no reason to believe that Williams, or anyone else in the vehicle, was armed, or that Williams actually intended to strike him or run over him. He also agreed that once the Shadow pulled away, it was no further risk to him unless "it went into reverse." The dissenting justices also noted that Williams' flight, rather than showing that he was not intimidated by the police, could instead be interpreted as a "clear sign of intimidation", fleeing from Hoshaw's display of a weapon. The dissenting opinion noted that the video showed Hoshaw rolling away from the Shadow, not being dragged by it, although it agreed that it wasn't possible to know "precisely what Miller saw and where he saw it from"

However, the majority prevailed, and Court affirmed the summary judgment in favor of Officer Miller and Grosse Point Park.

Murray-Ruhl v. Passinault
2007 WL 2478584 (6th Cir. 2007)

FACTS: On Sept. 5, 2003, Murray and Conklin attended a party at a friend's home. They agreed to drive two young women home, Rodriguez and Straub and to that end, "Conklin dropped off Murray and Rodriguez at Uncle Buck's bar, where Murray had parked his truck earlier in the evening, then left to take Straub home."

As Murray left the lot, he saw Deputies Passineault and Jenkins (Shawassee County SO) drive by in their patrol car. "In a moment of panic, presumably because he had violated his parole by driving across adjacent parking lots and pulling into an alley that opened into a parking lot for nearby businesses." He and Rodriguez then ducked down to hide. Alerted to the erratic driving, the officers followed and found the truck, and parked directly behind it. Thinking it was unoccupied, they began to search the area. As they passed the truck, however, "Murray started the truck's engine."

From that point, the facts were disputed. The officers claimed that Murray "accelerated directly toward Passinault," trapping him between the truck and a "pole barn." Passinault claimed to have ordered the driver to stop, and that he was ignored. As the truck came close to him, Passinault fired his "first shot at the driver." "But immediately after the shooting and for some days afterward, he reported that he had been hit by the truck and injured – even going so far as to call for an ambulance to come to the scene because he needed medical attention." However, the Court noted, "that version of the facts turned out to be a

²¹⁷ See Dudley v. Eden, 260 F.3d 722 (6th Cir. 2001); Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000).

complete fabrication.”²¹⁸ Passinault continued shooting after the truck passed him, “claiming later that he believed that the driver might be heading toward his partner, Jenkins, who was on foot somewhere in the area” and because he “was concerned for the safety of other officers who had been summoned to the scene and for the public in general.” (The vehicle was not moving fact, however, and there were no other people around at the time.)

It was later determined that Passinault fired 12 shots, of which two or three struck Murray. The vehicle stopped in a ditch some distance down the road, with “Murray slumped over the wheel, dead.”

Because Rodriguez was an eyewitness, the “plaintiff was able to offer a significantly different version of events.” She stated that Murray was not trying to strike Passinault, but to move “toward the only exit available to him” – the only way out of the alley. Rodriguez also claimed that Passinault yelled for them to stop once and immediately fired his weapon, and that all remaining shots, after the first shot, were fired as the truck was moving away. “She testified, in fact, that she saw Passinault running after the truck as he continued shooting at it.”

The plaintiff also notes that the first shot could not have been the one that incapacitated, and eventually killed, Murray, because “he was able to operate the truck’s gas pedal for some distance after passing Passinault” and because the autopsy indicated the fatal shot entered from the rear. In addition, although Passinault justified continuing to shoot by stating that he believed Jenkins, among others, was in danger, Jenkins later testified that “he was not in the truck’s path and that he never felt in danger of being struck by the vehicle.” Finally, the plaintiff argued that “despite the officers’ suspicions that [Murray] might have committed a crime of some sort, the most serious offense they actually saw him commit was a traffic violation.”

Murray’s estate representative, his mother, filed suit on behalf of the estate against the Passinault, Jenkins and Shiawassee County, as well as the Sheriff. The deputies moved for summary judgment on the basis of qualified immunity, and the District Court granted that motion, holding that Passinault “acted reasonably when he shot and killed Murray and, alternatively, because the plaintiff failed to identify a clearly established right that was violated in the course of her son’s death.”

The Plaintiff appealed the order.

ISSUE: Is shooting at an apparently unarmed subject after they no longer pose a direct threat to another person a constitutional violation?

HOLDING: Yes

DISCUSSION: The Court looked at the facts, and applied the two pronged analysis required in Saucier v. Katz. First, the Court looked to whether the officers’ actions “violated a constitutional right.” With regards to Passinault, the Court agreed that an officer might use deadly force to protect themselves or another, and that his shooting must be viewed solely from his perspective at the time. The court agreed that “if Passinault had fired a single shot as the truck came at him - or even as it passed close to him” - that the Court might agree with the decision of the trial court. However, “one fact glaringly obvious from the record

²¹⁸ Although the Court all but accused Passinault of lying in his assertion that he had been struck by the moving vehicle, in fact, such perceptions are not unusual under such circumstances.

is that Passinault emptied his weapon at the vehicle, reloaded it, and fired at Murray perhaps as many as a dozen times even after the truck has passed by him and ,thus, after Passainult could reasonably believe that it imposed a threat to himself or - if Deputy Jenkins is to be believed - to his partner." And, '[i]t was one of these 'after shots' that proved to be fatal." The decisions rests completely upon whose version of the facts is the most truthful, and that is the purview of the jury, not the Court.

The court had previously held, in Smith v. Freland, that "a car can be a deadly weapon."²¹⁹ However, that does not mean that every time a vehicle is involved that deadly force is appropriate. In this case, the Court found that there was a dispute, in fact, as to "whether the officer could reasonably have believed that anyone's life was endangered by Murray as he attempted to flee in his truck." As such, the Court agreed, it was arguable that Murray's rights were violated.

However, that does not finish the analysis. The court next looked to whether that right was clearly established at the time. The Court looked to Brosseau v. Haugen²²⁰ and Smith v. Cupp²²¹, in respect to how other courts had looked at "police shootings in the context of vehicular flight." The court concluded that the right was clearly established that shooting is not justified when the suspect presents no clear risk to the officers or others, as was the case in this shooting.

The Court also looked at Jenkins' actions. Although the Court agreed that "[u]nder well-established Sixth Circuit precedent, a police officer may be responsible for another officer's use of excessive force if the officer "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force."²²² Only the last would seem to possibly apply to Jenkins. In Bruner v. Dunaway, the court had held that "a police officer who fails to act to prevent the use of excessive force may be held liable when (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring."²²³ However, in this case, it was apparent that "Jenkins lacked sufficient time to act to prevent Passinault's use of excessive force."

The Court affirmed the trial court's decision in favor of Jenkins, but reversed its decision with respect to Passinault.

Green v. Taylor

239 Fed.Appx. 952, 2007 WL 2478663 (6th Cir. 2007)

FACTS: On Aug. 27, 2002, at about 1:14 a.m., Officer Clayton (Cleveland, OH, PD) saw a vehicle make a "quick turn." He learned from dispatch that the vehicle had been reported stolen or was suspected in a crime. Another officer joined him, and the two managed to stop the suspect vehicle. As Officers Taylor and Baeppler got out of the second unit, the suspect vehicle, driven by Hoyle, took off, almost hitting Officer Taylor.

²¹⁹ 954 F.2d 343 (6th Cir. 1992).

²²⁰ 543 U.S. 194 (2004).

²²¹ 430 F.3d 766 (6th Cir. 2005).

²²² Turner v. Scott, 119 F.3d 425 (6th Cir. 1997).

²²³ 684 F.2d 422 (6th Cir. 1982).

At this point, the pursuit was on. Within three minutes, Hoyle made an abrupt turn, he claimed, later, to be avoiding a head-on collision with yet another officer. Taylor called out on the radio that the occupants were “bailing” - as he knew the alley was a dead-end. However, Hoyle continued on and struck a fence. Baeppler pulled up behind the vehicle and he and Taylor approached, with guns drawn. Baeppler, at the driver’s door, was ordering the occupants to show their hands, but they did not do so. Taylor ended up “pinned between the vehicle, the fence, and the patrol car” as the suspect vehicle “lurched backward.” Baeppler shot the driver in the face. At some point, Taylor was hit by the suspect vehicle and fell, and he, too, attempted to shoot the driver. Both of his shots struck Mason (the front seat passenger) in the back.

Michael, a back seat passenger, told a different version, supported by the testimony of Hoyle and others. Hoyle stated that the engine was running but that he did not put the car in reverse. Further, he stated, he could not get out of the car because the doors were locked. Michael stated that he raised his hands and that the car did not back up, and that the officers moved the suspect vehicle backward after the shooting, but prior to crime scene photos being taken.

Sears witnessed the shooting from a nearby vacant lot. He stated that one of the officers “fell on one knee” and that was when the other officer (Baeppler) started shooting. He testified that he did not believe the vehicle was running or that it moved backwards. He also claimed “that he saw two officers move the vehicle away from the pole and scratch the front of the patrol car with a chisel” and that “a sergeant yelled at the officers for moving the car.”

The Internal Affairs report found that Taylor was standing on the passenger side of the vehicle, and that he had become pinned. Taylor admitted that the police vehicle had been moved, “because another officer mistakenly believed that the patrol car needed to be moved to allow EMS access to the suspects” but that the suspect’s vehicle had not been moved.

The evidence indicated that the entire incident occurred in less than 4 minutes, and Hoyle, eventually, pled guilty to involuntary manslaughter in Mason’s death. Green (on behalf of Mason’s estate) filed suit against Cleveland and a number of officers. The District Court granted summary judgment against all of the defendants except Taylor and Baeppler. It concluded that Baeppler was entitled to qualified immunity on the shooting claim, but that there was a issue of fact regarding the claim of intentional spoliation²²⁴ of the evidence. The Court denied qualified immunity for Taylor, finding genuine issues of material fact regarding whether the Pontiac reversed and whether Taylor was standing when he fired.

Taylor appealed.

ISSUE: May an officer use deadly force when they are not faced with a serious risk of harm to themselves or to another?

HOLDING: No

DISCUSSION: The Court reviewed the use of force, and stated, at the outset, that “only in rare instance may an officer seize a suspect by use of deadly force.”²²⁵ Further, [t]here are three factors that courts should consider in determining whether an officer’s actions were reasonable under the Fourth Amendment:

²²⁴ The intentional destruction of a document (or other item) or an alteration of it that destroys its value as evidence.

²²⁵ Livermore v. Lublan, 476 F.3d 397 (6th Cir. 2007).

“(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the police officers or others; and (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight.”²²⁶ However, “[t]hese factors are not an exhaustive list, as the ultimate inquiry is ‘whether the totality of circumstances justifies a particular sort of seizure.’”²²⁷

The Court found that Taylor’s use of force was questionable. Green had presented evidence that challenged Taylor’s description of the events, sufficient to overcome his demand for qualified immunity. The Court found that it was possible that a jury would find that there was no immediate threat to the officers, given that the chase was over, the suspect vehicle was trapped and the patrol cars blocked its escape.

The Court further found that the “right not to be shot unless a suspect poses an immediate threat to the officers or others” was clearly established at the time of the shooting.”

The court affirmed the trial court’s decision.

42 U.S.C. §1983 – QUALIFIED IMMUNITY

Gill v. Pontiac Police Officers Lochicchio and Main
2007 WL 579666, 2007 Fed.App. 0148N, 6th Cir. Mich. 2007

FACTS: Gill “alleged that when he was stopped for a traffic violation, he ‘cooperated entirely’ with the officers’ instructions but that, despite his cooperation, the defendants ‘threw [him] to the ground, beat him, kicked him, punched him and caused severe and debilitating injuries.’” The officers, however, “claimed qualified immunity and moved for summary judgment, contending that contrary to the allegations in the complaint, the videotape of the arrest recorded by a camera mounted on their patrol car showed that [Gill] was not compliant and that his resistance to their orders was the basis for their use of force to the extent necessary to effect Gill’s arrest.”

The District Court denied the officers’ motion, holding that the “striking[s] [after the plaintiff was on the ground]” could not be determined to be objectively reasonable, given the information available to them.” The officers took an interlocutory appeal.

ISSUE: Does a videotape always, definitively, show what actually occurs at a scene?

HOLDING: No

DISCUSSION: The Sixth Circuit noted that when “there is a dispute of fact such as the one described” in this case, the Court lacked “jurisdiction to review the question of qualified immunity on interlocutory appeal.” The officers’ argument that the “videotape shows conclusively what happened during the arrest” had to fail because the Court’s “review of the videotape indicates that the disputed contact between the plaintiff and the officers was obscured by the date and time stamp on the tape itself.” As such, the “tape does not establish conclusively what [the officers] contend,” that their force was appropriate.

²²⁶ Citing *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Smoak v. Hall*, 460 F.3d 768 (6th Cir. 2006).

²²⁷ *Id.* (quoting *St. John v. Hickey*, 411 F.3d 762, 771 (6th Cir. 2005)).

The Court dismissed the appeal for lack of jurisdiction.

42 U.S.C. §1983 - WARRANT

Elliot v. Lator

497 F.3d 644 (6th Cir. Mich. 2007)

FACTS: Just after midnight on Feb. 21, 2004, Anderson “placed a 911 call to report that he had been robbed at gunpoint.” Troopers Lator and Taylor were dispatched. Anderson explained that the robbery “stemmed from a financial dispute over an engine repair job that he had promised but never delivered.” The troopers were led to suspect Fox and McClure, and contacted the Clare County Sheriff’s Department and the Bay Area Narcotics Enforcement Team (BAYANET), a multi-jurisdictional drug task force. From these agencies, the learned of several likely locations where the pair might be located. Trooper Lator learned from a Detective Wilson, of BAYANET, that McClure and his family had lived at a particular address in Harrison, Michigan and that this was a possible residence for him. (Later, Detective Wilson testified that his information “was neither firsthand nor did he know whether it was recent or more than a year old.”

In fact, that address was the home of Steve and Glenda Elliot and their three children.

Trooper Lator prepared the following search warrant:

Your Affiant, Trooper Joshua Lator, is a Trooper with the Michigan State Police based at the Mt. Pleasant Post for the last 5 ½ years.

Your Affiant is part of an ongoing investigation in the armed robbery of Andrew Charles Anderson by William Raymond Fox and Ronald William McClure II on or about 02/21/04 at approximately 2200 hours in the City of Harrison, Clare County, Michigan.

As a result of the information gained through this investigation Felony Warrants have been issued for both William Raymond Fox and Ronald William McClure II for Armed Robbery.

Anderson stated to your Affiant that McClure had an on going dispute with him over the purchase of an engine. Anderson stated McClure approached him in the home of Joshua Kerns, 445 N. Fourth St., City of Harrison, Clare County, State of Michigan and demanded that he “make the deal right”. Anderson reported that McClure told him he knew he had \$600.00 in cash. Anderson stated that Fox then entered the room revealing a black hand gun tucked in his waistband. Anderson stated that Fox said “Don’t make me rob you.” Anderson stated he was in fear for his life and felt he was being robbed at gun point. Anderson stated he gave McClure five (5) twenty dollar bills from his pocket.

Through the course of this investigation your Affiant has learned that Ronald McClure II sometimes stays at 655 N. First St., City of Harrison, Clare County, State of Michigan.

Trooper Lator received his warrant, and proceeded to execute it on February 22, even though by that time, both of the suspects had already been arrested.

The opinion later noted that:

The search of plaintiffs' residence does not appear to have been a resounding success. To the contrary, plaintiffs allege that Lator and Taylor and other officers (1) failed to wait between knocking at and breaking down the door; (2) entered the home with weapons drawn and yelled for Steve and Glenda Elliot and their three young children to get down on the floor; (3) handcuffed Steve Elliot; (4) stepped on the hand of Glenda Elliot; (5) destroyed plaintiffs' furnishings and threw their beds around; and (6) held the family at gunpoint, and kept Mr. Elliot handcuffed, throughout the entire 45-minute search of the home. The search of plaintiffs' home revealed two registered firearms, neither of which was connected in any way to the prior night's robbery. No evidence of criminal conduct was discovered, and accordingly, no charges were filed against any Elliot family member in connection with the incident.

The Elliots filed suit, arguing that Troopers Lator and Taylor violated their federal constitutional rights, and also violated certain rights under Michigan state law. The troopers moved for summary judgment, arguing that even if the warrant was faulty they should be protected by the Leon²²⁸ good-faith exception. (They did not, notably, request that motion be based upon qualified immunity.)

The U.S. District Court found that the search warrant was not supported by probable cause and that, further, it was so "lacking in indicia of probable cause as to render official belief in its existence unreasonable." The Court ruled in favor of summary judgment in favor of the Elliots, and further ruled that the troopers "used excessive force" against members of the family, particularly noting that the suspected assailants were already in custody. The Court noted, in particular, that there was "an absence of any evidence that any [of the Elliots] behaved in a way that would have triggered any concerns for the safety of the officers or others on the premises." However, the Court declined to give summary judgment in their favor, instead, finding that since several important issues are disputed, it was appropriate to allow the case to go forward.

The Troopers took a collateral appeal of the denial of qualified immunity and summary judgment.

ISSUE: Are claims of unlawful seizure and excessive force separate?

HOLDING: Yes

DISCUSSION: The Court first addressed the issue on procedural grounds, finding that the troopers did not actually file a motion for qualified immunity and summary judgment, but simply responded to a motion of the Elliots by "claiming" qualified immunity. In an odd twist, if the Court overturned the trial court's decision finding summary judgment for the Elliots, and essentially ending the case in their favor, the troopers might, in fact, be subjected to "additional trial proceedings"

The Court also noted that the troopers did not challenge the trial court's decision on the excessive force claim, which it found inexplicable. The Court suggested that the troopers "believe that if they are accorded qualified immunity with respect to the unreasonable seizure claim, then it should follow that they be immune from the excessive force claim as well." However, that Court stated that was "not so." It further noted that

²²⁸ U.S. v. Leon, 468 U.S. 897 (1984).

"[t]he two claims are related, to be sure, but they are not inseparable, nor does the outcome of one dictate the outcome of the other." The Court continued:

For example, even if the troopers had a squeaky clean warrant to search the Elliots' home (or even if, under the circumstances, they were entitled to reasonably rely on a not-so squeaky- clean warrant), they still could have violated the Elliots' constitutional rights during the *execution* of the search warrant. The mere facial validity of the warrant, or indeed the officers' reasonable reliance on it, would not shield them from liability for all actions taken pursuant to that warrant.

The trial court had noted that the troopers could have limited their liability in this case by moderating their actions while serving the warrant, but they chose not to do so. Even if the Court found in their favor on the search warrant issue, they would still face trial on the excessive force issue, because they failed to even raise an appeal to the issue.

The Sixth Circuit declined to exercise jurisdiction over the appeal, and returned the case to the U.S. District Court for further proceedings.

42 U.S.C. §1983 - AGENCY POLICY

Meals v. City of Memphis (Tenn.) **493 F.3d 720 (6th Circ. 2007)**

FACTS: On Jan. 18, 2002, James Meals was driving in Memphis with his son, also named James and his grandson, William Meals. At about 6:30 that evening, Officer King was running radar when she spotted a vehicle, driven by Harris, "pass her going in the opposite direction at a high rate of speed." Officer King made a U-turn and followed, but without her lights or siren initially. She stated later she intended to catch up with the vehicle and make a traffic stop. Harris continued on, increasing his speed. (One contention at trial was whether Officer King was pursuing or following, with the distinction being that she did not run her lights and siren.)

Witnesses later related that they saw the Harris vehicle, with the marked Memphis unit right behind, just prior to the vehicles reaching an intersection. Both cars turned onto another, busy, commercial street, without stopping. Harris was actually driving the wrong way when they entered the intersection, but crossed over the grass median into the correct lane. They entered another intersection, on the green light according to witnesses, and Harris crossed over into opposing traffic again, striking the Meals' vehicle almost head on. The two adult Meals, and Harris, were all killed - 8 year old William Meals was permanently paralyzed as a result.

Aundrey Meals, William's mother, filed suit on behalf of the estate, against Memphis, Officer King and the Police Director, arguing violations of the Fourteenth Amendment, failure to train, and violations of Tennessee negligence law as well. The District Court dismissed Officer King and held a Daubert hearing on the testimony of Dennis Waller, an expert for the Meals on "police policy, practice, and procedure." The District Court later agreed, at the City's request, to exclude part of his testimony, finding that some of his opinions, specifically, testimony that the "continued pursuit of the Harris vehicle by Officer King was a

significant causal factor in the increasingly reckless driving behavior of Mr. Harris.” However, the order dismissing Officer King was withdrawn and the case was set for trial.

The City requested summary judgment, and the Court agreed to dismiss the police director and claims under the Fourth Amendment, finding that it is “not implicated in police pursuit claims because a police pursuit or an unintentional collision does not amount to a ‘seizure.’”²²⁹ It refused to dismiss the training issue, since the parties both had experts with countervailing views, and refused to dismiss the negligence issue because there were controverted facts.

A variety of appeals followed.

ISSUE: Does the violation of an agency policy automatically lead to liability?

HOLDING: No

DISCUSSION: Officer King (through the City) argued that it was an error for the District Court to “consider the unauthenticated documents and unsworn statements attached to the [Meals’] memorandum ... because they [did] not meet the requirements of the” Federal procedural rules. Officer King also argued that she was entitled to qualified immunity. The Meals’ representative argued that the documents (the City’s pursuit policy and all witness statements) were, in fact, all properly introduced. Further, the estate representative argued that Officer King was not performing a [protected] discretionary function and intentionally misused her vehicle in the pursuit.

The Court quickly determined that all of the documents were properly entered into the record. The Court next noted that as of the date of the chase, that “it was clearly established that a police officer’s conduct during the course of a high-speed pursuit could violate the substantive due process rights of persons injured during the pursuit.”²³⁰ In Sacramento v. Lewis, the Court found that a “plaintiff must prove that the police officer’s conduct ‘shocks the conscience’ to be actionable - and a high-speed chase “with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability....”

The Court found no reason to believe that Officer King had any inappropriate motive or ill will toward Harris or anyone else. Even though she allegedly violated the City’s pursuit policy, the court was “compelled to conclude, despite the tragic results stemming from Officer King’s violation of the City’s policy, that the facts in the present case do not make out a substantive due process violation” under the Lewis criteria. Because she did not violate the constitutional rights of the plaintiffs’, there was no basis for liability against the City either.

The Court reversed the denial of qualified immunity in King’s favor, and in the City’s favor, and remanded the case for further proceedings.

²²⁹ See Sacramento v. Lewis, 523 U.S. 833 (1998).

²³⁰ Id.

42 U.S.C. §1983 – MEDICAL CARE

Hollenbaugh v. Maurer/Rotolo/Johns
2007 WL 843802 (6th Cir. Ohio 2007)

FACTS: On May 27, 2003, at about 5 p.m., Hollenbaugh and Brewer “were involved in a minor traffic accident [with another party] in Wooster, Ohio.” Officer Rotolo responded and found Brewer sitting in the driver’s seat and Hollenbaugh in the passenger seat of the U-Haul they occupied, but the other driver told the officer that they believed the two had switched seats after the wreck. Rotolo suspected there was alcohol involvement, but could not tell for sure, so he allowed Brewer and Hollenbaugh to leave.

About an hour later, Officer Rotolo went to Brewer’s home to “continue his investigation.” Brewer directed him upstairs to find Hollenbaugh, who she had confirmed was actually the driver, and he found Hollenbaugh sick. He claimed to have vomited and had diarrhea, and stated that he “had the flu.” He also claimed that his chest hurt. Rotolo put Hollenbaugh through several field sobriety tests. Hollenbaugh agreed that he’d had a couple of beers, and “he appeared to be swaying and could not keep his balance.” Rotolo later admitted that Hollenbaugh told him multiple times that “he was ill.”

Rotolo arrested Hollenbaugh and transported him to the jail. Hollenbaugh was taken through booking, where he told several jail officers that he “had the flu, was going to be sick, and wanted to go to the hospital, and he had slurred speech.” Later testimony indicated the he “passed out or slumped down a couple of times” and that Rotolo and others had to support him. One of the jail personnel provided him with a waste can should he vomit, as he claimed he might do. He did not respond to the majority of the booking questions, including those concerning medical history. At one point, jail officer Ott “observed Hollenbaugh lying flat on his back on the floor and heard him” claim that his chest hurt. She tried to get a blood pressure reading but was unable to do so because Hollenbaugh was “flailing his arm.” Ott claimed that Hollenbaugh was “awake but incoherent.” In the BAC room, the officers attempted to get him to take a breath test, but “Hollenbaugh did not respond to the breath test instructions, and the officers recorded this as a refusal to submit to the test.”

Hollenbaugh was eventually taken to a holding cell, and a jail command officer recommended that he be placed on a 15 minute observation schedule. (This was apparently not done, however.) During the ensuing hours, Hollenbaugh was observed in his cell by several jail officers. Two of the officers stated that Hollenbaugh told them he thought he had blood poisoning and that “he needed to go to the hospital.” Two jail guards admitted they told him that he was sick because of his alcohol consumption. Inmates in the cell with him claimed that he “vomited, including blood, throughout the evening” and that they were unable to get the officers to respond.

The next morning, Hollenbaugh was found dead, and the coroner later reported that he died between 11:30 p.m. and midnight, “from cardiac arrest caused by coronary artery disease.”

Hollenbaugh’s estate brought suit under 42 U.S.C. §1983, claiming that if the defendant officers and Wayne County “had sought medical treatment for Hollenbaugh, he would not have died” and that they were deliberately indifferent to his condition. The District Court dismissed the county and some of the defendant officers, but refused to dismiss Rotolo and the jail personnel (Ott, Butler, Johns and Johnson) who had been most closely involved with Hollenbaugh. Those defendants appealed the denial of qualified immunity.

ISSUE: May an officer who is aware that a prisoner claims to be ill, and who displays obvious symptoms of illness, be entitled to qualified immunity for failing to obtain appropriate medical care for that prisoner?

HOLDING: No

DISCUSSION: The Court reviewed the standard for qualified immunity, and quickly agreed that all of the involved officers were state actors. Next, the Court agreed with the trial court that “Hollenbaugh’s claims of improper denial of medical care fell under the Fourteenth Amendment” and that it was a constitutionally protected right. Further, a “claim of deliberate indifference to medical needs has both objective and subjective components.” First the objective inquiry is whether the “alleged deprivation is sufficiently serious” as to pose a serious risk of harm to the detainee. The second inquiry is whether the officers involved “had a ‘subjectively culpable state of mind in denying’” medical care, and that they “knew of and disregarded a substantial risk of serious harm to [the detainee’s] health and safety.”²³¹

The Court addressed the subjective component for each officer individually. The court agreed that Rotolo, who had extensive contact with Hollenbaugh, and who he knew claimed to be ill, was not entitled to qualified immunity. With regard to Deputy Jailer Ott, the Court found that she also had sufficient information as to have realized that Hollenbaugh was in serious medical need. Deputy Jailers Butler and Johns, who assisted with transporting Hollenbaugh to the BAC room and who tried to get a blood pressure and pulse from him at various points, also had sufficient information to have realized Hollenbaugh’s extreme medical need. The Court further found that Capt. Johnson, a jail commander, also had sufficient contact with Hollenbaugh, although admittedly much less contact than the other defendants, to have realized his need.

Finally, having quickly decided that the requirement to provide medical care was clearly established, the Court upheld the decision of the District Court.

Cooper v. County of Washtenaw
2007 WL 557443, 2007 Fed.App. 0118N (6th Cir. Mich. 2007)

FACTS: On March 3, 2003, Morton pled guilty to misdemeanor crimes, and was released on his own recognizance, to return for sentencing on April 3. However, he failed to appear, and a bench warrant was issued. He was arrested on June 3 by the Dearborn police, and transferred to the Ann Arbor police. During that “exchange, Morton attempted to escape and was caught.” He became “violent toward the arresting officers and toward himself” and on the way to Ann Arbor, he “banged his head on the safety glass of the patrol vehicle and stated that he wanted to kill himself.” Concerned, the officer transported him instead to a hospital, for psychological evaluation. He was found to be positive for cocaine and his blood alcohol was .363, and the hospital concluded that his behavior was as a result of his intoxication. He was released to be arraigned.

“At the arraignment, Morton once again reacted violently when he was told he would not be released while he awaited his sentencing hearing in a few days.” He was physically restrained, and the judge ordered that

²³¹ Garretson v. City of Madison Hts., 407 F.3d 789 (6th Cir. 2005); Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001); Farmer v. Brennan, 511 U.S. 825 (1994)

he be placed on suicide watch. Officer Watchowski (Ann Arbor PD) was present during the hearing, but later stated that he did not hear that order, but did agree that he would have normally received a paper copy of the court disposition of the case, and that he would likely have read it. The Ann Arbor PD returned Morton to the jail, to await sentencing.

Deputy Raciti booked Morton at the jail that day, and placed him on suicide watch, pursuant to the order. Morton was given a flimsy paper gown²³² and placed into an observation cell, where he remained until he was returned to the courthouse on June 12, for sentencing. He had been medically evaluated during his state and “cleared of all alcohol/narcotic withdrawals” a few days earlier.

Officers Watchowski and Lawrence arrived to transport Morton back to Court. They asked about Morton’s condition and were assured that he was fine, and “alright to be transported.” At some point, allegedly, the two transport officers were informed that Morton was on suicide watch, but they later claimed not to recall that. The two officers knew, however, that he was in the paper gown when they arrived, and he was allowed to change from that into a jail medical uniform, which was a white tunic and pants.

The officers later testified that Morton appeared normal and that they’d conversed with him on the way. Morton accepted his sentence of 93 days calmly. He was placed in a holding cell, and left, “for a little over an hour unsupervised.” When the transport officers returned, they discovered Morton “had hanged himself with his shirt in the cell.”

Morton’s legal representative (Cooper) sued, claiming the officers had shown “deliberate indifference to the suicidal tendencies of Morton.” Watchowski and Lawrence later “admitted that suicide risk was a major concern when inmates were seen wearing bam bam gowns, but they further testified that other reasons were equally possible for the gown.” Deputy Raciti, also a defendant, agreed that there were other reasons for the gown, and other reasons for such individuals to be placed in observation cells. The trial court noted that at most, the officers were negligent, and that their actions did not rise to the level of deliberate indifference required for such a federal lawsuit. The Court noted that even though the two Ann Arbor officers had “observed enough indicia of suicidal behavior to have drawn the inference” that he was, in fact, suicidal, there was no proof “that they had actually drawn the inference.” The allegation against Ann Arbor and Washtenaw County that they failed to properly train their officers failed because there was no allegation that the “County and the City themselves engaged in the constitutional violation.”

The District Court awarded summary judgment to all of the defendants. Cooper (on behalf of Morton’s estate) appealed.

ISSUE: Are suicidal tendencies considered to be a serious medical need?

HOLDING: Yes

DISCUSSION: The Sixth Circuit agreed that Morton was a convicted prisoner at the time of his suicide, and thus entitled to certain rights under the Eighth Amendment, and that such rights included a “right to medical care for serious medical needs, including psychological needs.” The question, therefore, was whether there “exist[ed] a triable issue of fact over whether Defendants discharged their constitutional responsibilities while Morton was in custody.”

²³² The gown was referred to as a “bam-bam” gown, as it resembled the outfit worn by Barney on The Flintstones.

The Court started its assessment by noting that the Eighth Amendment “prohibits mistreatment only if it is tantamount to ‘punishment’ ... that “unnecessarily and wantonly inflict[s] pain.” The Court agreed that “suicidal tendencies are considered ‘serious medical needs’” for the purposes of this analysis.” The court noted that “[t]here are two distinct prongs of the deliberate indifference standard: An objective component and a subjective component.” The medical need “must be, objectively, sufficiently serious”²³³ and the Court agreed that a risk of suicide satisfies that requirement. The “subjective component actually has three prongs embedded within it.” “First, the plaintiff must show that the official subjectively perceived the facts that gave rise to the inference of the risk,” that “the official actually drew the inference, and, importantly, not just that he or she should have done so.” The last prong is that the “plaintiff must show that the official consciously disregarded the perceived risk.”²³⁴ In Farmer, the Court “indicated that the line between these two concepts is marked by actual knowledge” and equated it to “criminal recklessness.” In a situation involved a risk of suicide, the “officials will necessarily be accused of a failure to act, which usually falls in the domain of negligence.”²³⁵

The Court reviewed the law of qualified immunity and applied it to the facts and the individual defendants. With regards to Officer Watchkowski, the Court noted that he had “perceived enough facts to give rise to an inference of the risk [of suicide], which is the first prong of the subjectivity component for deliberate indifference.” The Court further agreed that it could reasonably infer that “Watchkowski was on notice that Morton was a suicide risk.” The Court agreed that the law was clearly established that one under a risk of suicide was entitled to appropriate treatment and supervision. As such, the Court found that qualified immunity, and summary judgment, was inappropriate “with respect to Defendant Watchkowski.”

However, the Court found no reason to believe the Officer Lawrence, the other transport officer, “had no actual knowledge that Morton was on suicide watch.” He may have observed clues, but it noted that “the record is replete with other explanations for each of those observations besides the suicide watch explanation.” The fact that apparently “Watchkowski violated Ann Arbor security procedures by not at least checking on Morton after the requisite thirty minutes” could not be imputed to place liability on either officer, since a “violation of internal policy does not ipso facto give rise to a presumption of unconstitutionality.” As such, “Lawrence was properly granted summary judgment.”

Next, the Court moved on to Deputy Raciti. The Court noted that there was no doubt that she knew that Morton was on suicide watch, and there was at least strong evidence that she failed to specifically inform the two Ann Arbor transport officers of that fact. Since there was no indication that Deputy Raciti knew that Officer Watchkowski had attended the arraignment, “it would be illogical to relieve ... Raciti of her duty to warn Morton’s transport officers that he was a suicide risk so that they could continue to closely observe him.” In addition, even if she did know, it was questionable if she “should have assumed ... Watchkowski knew Morton was still on suicide watch on June 12, 2003.” The Court found that sufficient questions remained that it would be possible for a jury to find that she “acted with deliberate indifference toward Morton” and thus, that “summary judgment was inappropriate” at this time.

With regards to the two government entities, the Court found that summary judgment was inappropriate for the City of Ann Arbor, and that the trial court must further determine whether a jury could “conclude that

²³³ Farmer v. Brennan, 511 U.S. 825 (1994).

²³⁴ Id.

²³⁵ Id.

Watchkowski's deficient behavior can be fairly characterized as a 'city policy.'" Washtenaw County, however, was dismissed from the action, for other reasons.

In sum, the Sixth Circuit affirmed the summary judgment in favor of Officer Lawrence and two of the jail officers who played minor roles, and in favor of Washtenaw County. It reversed the summary judgment in favor of Officer Watchkowski and the City of Ann Arbor, however, and remanded that part of the case back to the District Court for further proceedings.

42 U.S.C. §1983 - SEARCH & SEIZURE

Duncan v. Jackson

2007 WL 1836176 (6th Cir. Tenn. 2007)

FACTS: On Dec. 26, 2002, the FBI received information that Davis, wanted for bank robberies committed in Georgia, might be with a friend in Tennessee. Agent Healy was assigned to investigate, and he, in turn enlisted Sheriff Burnett and Chief Jackson to assist. Davis was believed to be driving a white van, and a white van was located in the friend's driveway. Healy also showed a photo of Davis to a couple who were leaving the premises and they agreed that he was on the property.

The officers searched the premises, arguably on consent although that was disputed. They did not find Davis. The property was owned by the Duncans, who were present, and also present during the search were another woman and three men. Three of the men were in the garage. Healy later testified that the woman "gave permission for them to conduct a security sweep for the suspect," but Loretta Duncan testified she did not give consent, but was "simply directed to call everyone into the kitchen." The man and woman inside the house were sent outside, where they were corralled by Chief Jackson. Two of the men (apparently one from the garage) were handcuffed. The woman was eventually permitted to go back inside for a child. Sheriff Burnett spoke to one of the men, who he stated, later, gave consent for a search, but again, that man denied giving consent.

Once they determined that Davis was not present, everyone was released and the officers left the premises. The search took between ten and thirty minutes.

Many of the occupants then sued the various officers under 42 U.S.C. §1983. Eventually, all of the claims against the FBI were dismissed, and the Court granted summary judgment on all claims against the local defendants, except for claims of unlawful search and seizure and state law claims of trespass. Chief Jackson and Sheriff Burnett appealed the denial of qualified immunity on their behalf.

ISSUE: If a local officer actively assists federal agents in a search, may the local officer be held liable if that search and/or seizure is flawed?

HOLDING: Yes

DISCUSSION: First, the Court noted that only the Duncans, husband and wife, had standing to file suit, as only they would have a "reasonable expectation of privacy" in the home. However, since the issue of consent was disputed by the parties, the Court did not have jurisdiction to resolve those factual issues. The

Court was then brought to the question of “whether there [was] evidence of a direct connection between the actions of either Chief Jackson or Sheriff Burnett and the search of the premises.”

Looking at each of the officers, the Court determined that Chief Jackson was “not involved in the investigation or the decision to search the premises, and did not personally participate in the search of the premises.” As such, he was entitled to qualified immunity and dismissal from the suit. With regards to Sheriff Burnett, however, the evidence supported the assertion that Sheriff Burnett was actively involved in the search, spoke to the occupants and entered the garage to contain suspects. He was not entitled to qualified immunity.

Moving to the detention of the suspects, the Court noted that Chief Jackson was involved in detaining two of the parties by handcuffing (only one of whom was a party to the suit) The Court found that if the search was valid, Chief Jackson’s detention of the parties was appropriate - but that it could not determine, at this stage, whether the search was in fact valid. As such, it affirmed the denial of Chief Jackson’s summary judgment on the part of those particular plaintiffs. The same applied to Sheriff Burnett, who had direct contact with only a couple of the plaintiffs - albeit different plaintiffs than Chief Jackson. Because there was a factual dispute, summary judgment was not justified.

The Court affirmed, partially, the decision, and permitted the case to go forward against Chief Jackson and Sheriff Burnett.

McGraw v. Madison Township

231 Fed.Appx. 419 (6th Circ. Ohio 2007)

FACTS: On June 7, 2003, Calandra showed up at McGraw’s door, “unshaven, with ‘glassy eyes,’ and a strong odor of alcohol.” Yelling and profanity ensued between the two men and McGraw reached for an unloaded pellet gun and pointed it at Calandra. Calandra screamed for someone to call the police and a neighbor did so.

Officers Ackerman, Boerner and Kirk were dispatched a call on an assault and that one of the men “was believed to have a gun.” Officer Ackerman arrived and found no one around at first, but found the complainant eventually. She reported what had occurred. At some point Calandra told Ackerman that McGraw had struck him. (Ackerman also stated that Calandra told him “that McGraw was a convicted felon who kept guns in his house” but Calandra later denied it.) The officers ran a check on McGraw and learned that although he’d been arrested for a felony, he had not been convicted. They also did a background check on Calandra, but they did not search his vehicle.

The officers set up a perimeter around McGraw’s house and asked for help from nearby agencies. The dispatcher tried to call the house, with no success. Sgt. Byers arrived and took charge.

Some 20 to 40 minutes afterward, McGraw walked out and headed toward his vehicle. The officers drew their weapons and approached McGraw, ordering him to the ground. He complied. One of the officers handcuffed him and assisted him to stand up. He was placed in a cruiser and eventually taken to jail. After questioning McGraw, and he admitted using the air pistol to threaten Calandra, officers searched his home and found the item.

McGraw was indicted on assault and menacing, but eventually pled guilty to disorderly conduct. He filed suit against various police officer defendants. The U.S. District Court denied the defendant's request for summary judgment on the basis of qualified immunity, and they appealed.

ISSUE: May an allegation that one person threatened another person (not witnessed by police) justify an arrest, without further investigation?

HOLDING: No

DISCUSSION: The Court sorted out issues related to the numerous individual defendants, including the Chief of Police. The Court refused to review some of the issue, but did address the denial of qualified immunity on the part of the officers involved. The defendants argued that they had sufficient exigent circumstances to justify their specific actions. The Court looked to U.S. v. Saari and noted that just as in this case, Saari was "peaceably occupying his home when the officers arrived, and there was no proof that anyone was being threatened inside."²³⁶ The Court reviewed several other cases, and found that there was no ongoing breach of the peace and that the evidence indicated that the altercation had ended.

The Court did not question the appropriateness of the officers establishing a perimeter, or even seizing McGraw and frisking him. The Court agreed, however, that the evidence did not support McGraw's arrest or the subsequent search of his home.

The Court affirmed the denial of summary judgment and allowed the case to go forward.

42 U.S.C. §1983 - SEARCH & SEIZURE - VEHICLE STOP

Humphrey v. Mabry

482 F.3d 840 (6th Cir., Ohio 2007)

FACTS: On Dec. 10, 2002, a little before 10 p.m., Columbus PD officers were dispatched on a "man with a gun" call. The suspect vehicle was identified as a "grey PT cruiser" being driven by a black male. (Two separate dispatches, transcribed in the opinion, identifies the color of the vehicle as grey.) The dispatch also provided a detailed description of the alleged driver, who was known to the reporting party.

During that same time frame, Humphrey was returning from work in his "bright blue PT Cruiser." Around 10:30 p.m., he came across a roadblock, being operated by Officers Mabry and George, and he stopped in the line of traffic. "To his surprise, Officers Mabry and George approached, drew their guns, pointed them at the car and yelled at Humphrey to get out." As he began to do so, Mabry "grabbed Humphrey roughly by the wrist," pulled him from the car and patted him down. Humphrey told them he had an injured thumb as they started to handcuff him, and they left that hand free. Officer George quickly searched the car and found nothing, and within a few minutes, they learned that Humphrey was not the suspect they'd been earlier told about, allegedly driving a similar vehicle. (The opinion noted that Humphrey, although a black male, differed in appearance a great deal from the description of the suspect, and further, that he was wearing a visible City of Columbus ID badge around his neck.) The actual suspect was apprehended some 20 minutes later.

²³⁶ 272 F.3d 804 (6th Cir. 2001).

Humphrey filed suit under 42 U.S.C. §1983 against the officers and the City of Columbus, alleging violations of his Fourth Amendment Rights and alleging, further, a “failure to train” the officers involved. The officers requested qualified immunity, which the U.S. District Court denied on the claims of “unlawful seizure and excessive force.” The officers filed an interlocutory appeal.

ISSUE: Do acknowledged mistakes made during an incident negate a finding of qualified immunity?

HOLDING: No

DISCUSSION: Using the “two sequential questions” required in deciding upon a qualified immunity defense, the Court first asked whether the facts alleged established a violation of Humphrey’s civil rights. The Court reviewed the standards both for an investigative stop and for a use of force, reasonableness, and concluded that Humphrey had made the threshold assertion that a constitutional violation occurred. The court concluded that “the Columbus police violated Humphrey’s Fourth Amendment rights when they misidentified his car, stopped him at gunpoint, forcibly seized him and restrained him, albeit briefly.”

Finding that the first question was answered in the affirmative, the Court moved to the second question, whether the right allegedly violated was “clearly established.” The Court noted that such inquiries must be “undertaken in light of the specific context of the case,” and that if reasonable officers could differ on the appropriateness of a particular action, that an officer was entitled to qualified immunity.

In this case the alleged “constitutional violations [were] based on the *collective* knowledge of a number of police officers....” The Court continued, stating that “where individual police officers, acting in good faith and in reliance on the reports of other officers, have a sufficient factual basis for believing that they are in compliance with the law, qualified immunity is warranted, notwithstanding the fact that an action may be illegal when viewed under the totality of the circumstances.” The Court looked to several cases in which officers relied upon communications from other officers, and in which officers asserted the good faith defense.

First, the Court reviewed the facts surrounding the allegedly unreasonable search and seizure claim against Mabry and George. The Court noted that there was conflicting information concerning whether the suspect was in a vehicle or on foot, the direction of travel of the vehicle, the license number, and other details. Humphrey’s vehicle was identified from a helicopter involved in the search. The officers sought out details, as well, double-checking the license number originally dispatched, which turned out to be mistaken. The Court agreed that it was “possible to fault Officers Mabry and George for seizing a bright blue PT Cruiser,” despite the multiple reports that the suspect vehicle was dark grey. The Court found that the officers, although mistaken, were reasonable in their belief that they should investigate Humphrey’s vehicle.

With regards to the excessive force claim against the two officers, the Court noted that the officers reasonably believed the subject in the car was armed, and approved the officers holstering their guns once they realized they were meeting no resistance from Humphrey. The Court also approved the care they took not to aggravate his existing hand injury by handcuffing him. The officers noted that they did not catch all of the preceding transmissions, but instead “were focused on the information most immediately transmitted to them - that there was a dangerous man with a gun in the PT Cruiser which they had stopped.” They quickly released him when they confirmed he didn’t match the description. The Court

found that the officers “could have reasonably believed that they were acting lawfully under the circumstances” and has such, were entitled to qualified immunity.

Next, the Court reviewed the situation as it relates to Officer Wheeler, the officer in the helicopter who identified Humphrey’s vehicle as the suspect vehicle. The Court noted that Wheeler had stated that “from his vantage point, Humphrey’s blue PT Cruiser looked dark grey” and that it was in the “limited geographic area where he had just been instructed to look.” The Court agreed that Wheeler’s identification of the vehicle was “perhaps unreasonable,” and that “Officer Wheeler’s mistakes were unfortunate, and that they fall short of the ideal standards of diligence expected of officers searching at night by helicopter for suspects in vehicles in a large city.” The Court did not, however, find Wheeler’s mistakes “so egregious that [it] would characterize them as plain incompetence or mistakes no reasonable officer would make in the circumstances.” The Court found that Wheeler was also entitled to qualified immunity.

The court found that the officers “individual mistakes were reasonable mistakes understandably committed in good faith while performing their job in a potentially dangerous situation.” The Court reversed the denial of qualified immunity, but noted that the case against the City for failure to train and related claims was not affected by this decision, and could continue.

EVIDENCE - TRIAL PROCEDURE

U.S. v. Kenney

2007 WL 579539, 2007 Fed. App. 0122N, (6th Cir. Mich. 2007)

FACTS: On the day in question, Kaye, a ferry deck hand, tipped off the federal authorities that Kenney might be smuggling in aliens from Canada.²³⁷ (He had observed Kenney previously with a number of people in her car, and on Nov. 6, he paid particular attention, and saw her leave with no more than one other person in her car, but return with six passengers in her car.) Kaye contacted the Clay Township, Michigan, police, and they “met the ferry on the dock at the mainland site.

Shortly afterward, Border Patrol agents arrived and questioned everyone in the vehicle. They conducted an “immigration check” on the passengers, and determined that while Kenney and her boyfriend, Wright, also in the car, were U.S. citizens, the remainder of the passengers were not, with one being from Jamaica and the remainder from India. (The Jamaican originally claimed to be a U.S. citizen, from Florida, but that was apparently quickly proven to be false.) Kenney originally told the agents that she had been bowling earlier, and then had gone to a bar on the island, and that the Jamaican man was “her cousin’s boyfriend” but later described him as “a friend.” She claimed to have picked up the other four people as a “favor for another friend.” However, Wright’s account was different, in that he said they had gone straight to the island and had not been at a bowling alley. At trial, later the agent “related this conversation over a hearsay objection by defense counsel, but the objection was summarily overruled on the basis of the co-conspirator exception.” The Jamaican man, finally identified as Dennis Jackson, claimed that Kenney was giving him a lift to his girlfriend’s house.

Determining that the stories were inconsistent, Agent Geoffrey arrested Kenney, Wright and Jackson. In an interview a few days later, Kenney admitted that she had been knowingly smuggling and detailed the

²³⁷ The Harsens Island ferry links the island to the United States mainland, less than a mile away, and only a short distance from the Canadian border.

"smuggling operation." One of the Indiana passengers also provided a great deal of information, and explained that he'd made arrangements through a broker to be picked up by, ultimately, Kenney, and that when Kenney saw the police on the dock, she had "motioned for them to duck down."

Kenney was convicted, and appealed.

ISSUE: Are non-hearsay statements subject to Crawford v. Washington?

HOLDING: No

DISCUSSION: The Sixth Circuit noted that the District Court had ruled "Wright's out-of-court statement was admissible as the declaration of a co-conspirator." Although doubting that the two were actually involved in a conspiracy, the Sixth Circuit concluded that the statement was not hearsay under FRE 801(c) "because it was not offered to prove that the declarant did not go bowling on November 6, but only that he said as much." Such "non-hearsay" does not "implicate any Sixth Amendment concerns such as those raised in Crawford v. Washington."²³⁸

The Sixth Circuit affirmed the decision of the trial court.

U.S. v. Sales
2007 WL 2618365 (6th Cir. 2007)

FACTS: On July 9, 2003, a CI informed Romulus (Michigan) officers that he had bought marijuana from Sales two days before, at his residence. While there, he had spotted a number of long guns and handguns - Sales was a convicted felon. He then participated in a controlled buy with Sales at the request of the PD, using PD money.

The next day, Romulus officers, along with ATF, executed a search warrant and found a number of weapons, ammunition, cash and marijuana. In particular, one of the loaded handguns, and an unloaded shotgun, was within 15 feet of the bulk of the marijuana.

Sales was arrested and given his Miranda warnings. He admitted to owning the weapons and the marijuana, and that he'd been selling it since he was 13. He admitted that he knew it was illegal to possess the guns, but claimed that he needed them for "home protection."

Several charges were placed against Sales relating to the weapons and the ammunition, and he was convicted on all counts. He then appealed.

ISSUE: Is a defendant entitled to the identity of an informant?

HOLDING: It depends

DISCUSSION: Sales argued that the search warrant used at his home was invalid, lacking probable cause, "because the underlying affidavit lacked indicia of the veracity and reliability of the CI." The Court reviewed the requirements for a warrant using a CI as part of its probable cause.

²³⁸ 541 U.S. 36 (2004).

The court noted that it had decided that “[w]hile independent corroboration of a confidential informant’s story is not a *sine qua non*²³⁹ to a finding of probable cause in the absence of any indicia of the informant’s reliability, courts insist that the affidavit contain substantial independent police corroboration.”²⁴⁰ However, “[s]o long as the issuing judge ‘can conclude independently that the informant is reliable, an affidavit based on the informant’s tip will support a finding of probable cause.’”²⁴¹ The Court agreed that although the affidavit does not contain facts that would support the CI’s reliability, the precaution the officer took in setting up the controlled buy “adequately corroborated the CI’s information” and supported the warrant.

Sales also sought disclosure of the identity of the CI, “arguing that the CI played an active role in the criminal activity.” The prosecutor, however, represented “to the court that he did not intend to use anything that happened between the” CI and Sales at trial. As such, the trial court denied Sales’ request to learn the CI’s identity. The appellate court noted that the “government has the privilege ‘to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.’”²⁴² It further commented that it “usually den[ied] disclosure when the informer was not a participant, and instead, ‘was a mere tipster or introducer.’”²⁴³ (Notably, “Sales was not charged for the events occurring during the controlled purchase made by the CI, but rather for the possession of the drugs and firearms the police located during the search of Sales’s residence.”)

Sales’s conviction was affirmed.

U.S. v. Powers
500 F.3d 500 (6th Cir. 2007)

FACTS: On Sept., 2004, a “Source of Information” (SOI) told a task force²⁴⁴ that Powers was “trafficking in significant quantities of cocaine.” The task force set up a sting operation targeting Powers. The SOI arranged to purchase two kilos, and the SOI traveled to the location of the transaction, along with Officer Cochran, who was undercover. Officer Patti was nearby, doing surveillance.

The SOI exchanged cell calls with Powers, which were recorded. At the time, Powers was trying to obtain the amount of drugs requested, and he also identified his vehicle. They eventually met and before the transaction took place, Powers was arrested. A kilo of cocaine was found in the van.

Three witnesses testified, Officers Cochran and Patti, and a DEA agent involved in the sting. “During their testimony, Officers Patti and Cochran offered information learned from and statements made by the SOI, some of which were direct quotes from the SOI and some of which represented information that the officers learned only through their interactions with the SOI.” The trial court ruled that the statements were admissible because “it found that, in general, these statements were ‘not offered for the truth of the matter stated.’”²⁴⁵ The Court had divided the “objectionable material learned from the SOI” into “three main categories: (1) background information on the Defendant – i.e., that Defendant was a well-known cocaine

²³⁹ “without which it could not be.”

²⁴⁰ U.S. v. Frazier, 423 F.3d 526 (6th Cir. 2005).

²⁴¹ U.S. v. Coffee, 434 F.3d 887 (6th Cir. 2006). See also U.S. v. Bennett, 905 F.2d 931 (6th Cir. 1990).

²⁴² Roviano v. U.S., 353 U.S. 53 (1957).

²⁴³ U.S. v. Sharp, 778 F.2d 1182 (6th Cir. 1985).

²⁴⁴ Drug Enforcement Agency (DEA), Michigan State Police and Detroit Police Department.

²⁴⁵ And as such, were not hearsay.

dealer – ostensibly admitted to show why the officers undertook the sting operation; (2) the SOI's identification of the white van as Defendant's vehicle; and (3) the SOI's identification of Defendant."²⁴⁶

Powers was convicted, and appealed.

ISSUE: Is information from a SOI/CI offered through another witness always in violation of the Confrontation Clause?

HOLDING: No

DISCUSSION: Powers argued that the trial court erred in admitting the statements made by the officers, repeating what had been said by the CI, who did not testify. The Court reviewed the Crawford/Hammon/Davis trilogy of Confrontation Clause, and further using U.S. v. Cromer, noted that it had previously "held that a CI's statements were testimonial and that therefore the district court erred in admitting them at trial." In fact, the Court noted that, given "what CIs do and the purposes for which law enforcement uses them, statements by CIs are generally testimonial in nature." However, The Court noted that this was "not to say that every CI's statement offered through a police officer at trial amounts to a Confrontation Clause violation." Information "provided merely by way of background," or information provide "to explain simply why the Government commended an investigation, is not offered for the truth of the matter asserted and, therefore, does not violate a defendant's Sixth Amendment rights."

The Court noted that "Cromer plainly establish[ed]" that the second and third of the categories" constituted "Confrontation Clause violations." It further stated that "[b]ecause the SOI's identification of both the van and Defendant were testimonial, out-of-court statements, offered to establish the truth of the matters asserted, and Defendant was not provided an opportunity to cross examine the SOI, Defendant's Sixth Amendment confrontation right was violated." However, the Court found that, although the trial court erred in admitting the statements, that the error was harmless.

Powers' conviction was affirmed.

U.S. v. Hearn
500 F.3d 479 (6th Cir. Tenn. 2007)

FACTS: In early, 2004, Jackson-Madison County (Tennessee) officers "learned from confidential informants that Hearn possessed large amounts of illegal drugs that he intended to sell at an upcoming rave party in Nashville." The officers set up surveillance and, on March 18, followed Hearn, who was in his vehicle, and tried to stop it. As they did so, "an unidentified white object, which appeared to be the top of a pill bottle," hit the police car. Hearn stopped, and consented to a search of the car. The officers found a semi-automatic weapon and a guitar case which contained documents belonging to Hearn, marijuana and pill bottles containing over 300 pills, some of which were identified as Ecstasy. With that, they were able to get a search warrant for his home, where they found ammunition for the weapon.

Hearn was indicted on federal drug trafficking charges. Hearn moved to suppress "statements by confidential informants because the introduction of the informants' statements would violate Hearn's

²⁴⁶ The opinion quoted the officers' statements extensively.

constitutional rights to confront witnesses against him.”²⁴⁷ The government agreed not to use any statements to prove specific elements of the charged offenses, intending only to “use the informants’ statements to show why authorities initiated the stop that led to the discovery of the contraband.” The trial court permitted the use of the CI statements in a limited way.

However, at trial, two witnesses “provided more expansive explanations, which implicated Hearn in a manner unlike that of any other evidence.” One of the officers “testified that he stopped Hearn because he learned” from a [CI] “that Mr. Hearn had large amounts of ecstasy and marijuana [and] was going to be leaving to take the narcotics to a rave party in Nashville.” Another officer testified that Hearn was investigated because an informant told him that Hearn was going to sell a large quantity of MDMA²⁴⁸ pills at a rave party. He also linked the drugs to Hearn’s residence and car.

Hearn was convicted, and appealed.

ISSUE: May officers broadly testify as to statements made by a non-testifying CI?

HOLDING: No

DISCUSSION: The Court started by noting that “the government’s conduct in this case makes clear that it introduced the confidential informants’ statements, at least in part, to establish possession with intent to distribute and firearms-possession in furtherance of drug trafficking.” The prosecution asked “broad, open-ended questions” and made no attempt to ensure “through narrow questioning or otherwise, that the officers did not testify as to the details of the confidential informants’ allegations.”

The Court agreed that “[a]dmission of the confidential-informant statements, therefore, violated Hearn’s right to confront witnesses against him.” The Court found “no conceivable reason, besides implicating Hearn, for the officers to testify that a confidential informant told them that Hearn placed the drugs in his car and was driving to Nashville to sell them.” The CI’s statements went to the “heart of the government’s case” and that meant that the admissions were not harmless.

Hearn’s convictions were reversed and the case remanded.

U.S. v. Gibbs

506 F.3d 479 (6th Cir. Mich. 2007)

FACTS: In Aug., 2005, the Muskegon County (Mich.) Sheriff’s Department and Michigan State Police “were investigating a series of burglaries in Muskegon County.” Gibbs and Miel became suspects; both were convicted felons currently on parole. Detective Sowles (Sheriff’s Dept.) and Trooper Coon (MSP) “interviewed Gibbs at the office of his parole agent on August 10, 2005.

Gibbs denied that he was involved in the burglaries but did provide some information on the location of some of the guns, information he claimed to have gotten from Miel. He denied that there were any guns at his mother’s home, where he was living. The parole agent, Cole, told Gibbs and the investigators that he had received a tip that Gibbs might have some long guns in his bedroom. He told Gibbs he would be doing

²⁴⁷ *Crawford v. Washington*, 541 U.S. 36 (2004).

²⁴⁸ Ecstasy.

a search, and asked Gibbs what he might expect to find. Gibbs told Cole that there was a pistol on a shelf near the bed, but denied that he possessed or attempted to sell any firearms.

As expected, the parole agents found the handgun, along with a quantity of ammunition, knives and other items. Gibbs, now in jail, called a friend Barrett, and stated “well, they got me - they got that pistol at my house.” He told Barrett to contact his sister or his girlfriend and “ask them to claim the gun as theirs.”²⁴⁹

Gibbs was indicted of being a felon in possession. He stipulated everything except “actual or constructive possession of the firearm.” He was convicted, and appealed.

ISSUE: Does testimony offered solely as background violate the Sixth Amendment?

HOLDING: No

DISCUSSION: Gibbs argued that the officers “violated the district court’s pretrial order” by testified regarding his involvement in “various home invasions” in the area. Trooper Coon had testified as to how they came to be questioning Gibbs about what might be found in his bedroom, over objections by Gibbs. Gibbs also objected to the trial court permitting Miel “to testify that he had seen other guns in Gibbs’ bedroom. Detective Sowles and Trooper Fiats also testified about their involvement in the investigation of the home invasions and how that led them to Gibbs. The Court found that the statements, even if admitted in error, were not unduly prejudicial and were harmless.

Gibbs argued, also, that the “out-of-court statement by ... a fellow parolee, through the testimony of Agent Cole” was improperly admitted. Cole had testified that the parolee had given him a tip that “Gibbs had some long guns hidden in his basement bedroom.” Gibbs argued that this statement “was improperly admitted hearsay in violation of the Confrontation Clause of the Sixth Amendment.” The government did not contest that the statement was “testimonial in nature” - as discussed in U.S. v. Cromer.²⁵⁰ However, the government contended that it was not legally hearsay, but “instead testimony offered simply as background evidence.”²⁵¹ Cole testified as to the tip “solely as background evidence to show why Gibbs’s bedroom was searched” - and that his alleged possession of long gun “did not bear on Gibbs’s alleged possession of the .380 Llama pistol with which he was charged.” Again, the Court found that the evidence was only a “minuscule part of his overall testimony” and that the error, if any, was harmless.

Gibbs’s conviction was affirmed.

U.S. v. Mackey

249 Fed.Appx. 420, 2007 WL 2859717 (6th Cir. Ohio 2007)

FACTS: On May 25, 2004, Dayton PD officers searched an apartment after surveilling it for some 30 minutes. During that time, they saw 4-6 people enter and stay a brief time before leaving, but did not see Mackey enter or exit. At 9 p.m., the team knocked and announced and then, upon “hearing individuals running inside the apartment, broke down the common door to the building and entered the apartment that they were authorized to search.”

²⁴⁹ The call was recorded.

²⁵⁰ 389 F.3d 662 (6th Cir. 2004) citing Crawford v Washington, 541 U.S. 36 (2004).

²⁵¹ U.S. v. Martin, 897 F.2d 1368 (6th Cir. 1990)

They found Murray and Mackey standing near the sink, and “found a loaded gun - with certain distinctive characteristics - in the sink, just inches beneath Mackey’s hands, and loose marijuana, packaged marijuana, plastic baggies, and digital scales on the counter next to him, well within an arm’s reach.” He was patted down and a cell phone was found in his pocket. They handcuffed Mackey and put him on the floor, with the cell phone nearby. During the search, the cell phone “rang approximately give to seven times and each time, “the screen displayed a picture of a handgun on top of a pile of money and marijuana.” The gun in the photo appeared to be the same gun recovered from the sink, and the marijuana was “packaged similarly to the marijuana found on the kitchen counter.”

One of the officers testified that “in his expert opinion, the apartment was set up for the sole purpose of selling illegal narcotics,” as it was well barricaded, sparsely furnished, lacked appliances, and that a doorman collected money as people entered. In addition, the maintenance employee testified that “every time he entered the apartment, he saw guns and narcotics everywhere.”

Mackey was indicted for being a felon in possession, and in trafficking in marijuana. He moved to exclude the pictures on his cell phone - including the photo that came up when the phone was ringing. The trial court concluded “that sufficient evidence linked the phone to [Mackey], that the gun displayed in the picture might be the same gun that was found in the sink, and that the marijuana bags displayed in the picture were similarly packaged to the bags found on the kitchen counter.”

Mackey was convicted, and appealed.

ISSUE: May photos in a cell phone be used to prove ownership of an item depicted in the photos on that telephone?

HOLDING: Yes

DISCUSSION: The court found that there was sufficient evidence that “Mackey had either actual or constructive possession of the firearm in the sink.” It was not necessary to prove that Mackey had just placed it in the sink or was attempting to pick it up, in either event, he could be considered to be in actual possession. Although other cases had indicated that “mere presence near a firearm” was insufficient to prove possession, in this case, the gun was easily within Mackey’s reach, was inches from his hands and in an apartment used for drug trafficking. In U.S. v. Newsom, the Court had agreed that proximity plus other relevant factors was sufficient to prove constructive possession.²⁵² (The same logic was applied to the marijuana.)

With respect to the photos and other evidence found in the phone, the court found that the gun in the photo appeared to be identical to the gun in the sink, as it “had some very distinctive features.” Mackey also argued that the chain of custody was flawed and that “the phone actually belonged to his sister, not to him.” The prosecution, however, “introduced data from the phone - including names from the phone book, incoming and outgoing calls stored in the phone’s history, and the date on which the pictures of the gun was [sic] taken” - showing that “Mackey possessed and used the phone on the day the picture of the gun was taken.” The court found the evidence from the phone was relevant and admissible.

²⁵² 452 F.3d 593 (6th Cir. 2006).

Mackey's conviction was affirmed.

U.S. v. Barry-Scott
2007 WL 3129723 (6th Cir. 2007)

FACTS: Between Jan. 27, 2003 and April 21, 2003, Westin, a CI, made controlled buys from Barry-Scott at her residence. Westin was supervised by Officer Solic (Austin Township PD). Eventually, Officer Solic detailed the buys in an affidavit and Judge Durkin signed the warrant.²⁵³ The search resulted in the discovery of cocaine base and \$9,000 in cash. An addition \$1,500 was found in Barry-Scott's bra. Apparently present at the time of the search was Cornell Kennedy, the "boyfriend of Barry-Scott's adult daughter, Akia Hutchins."

Barry-Scott was indicted. She argued for suppression of "certain testimonial statements." She requested a writ of habeas corpus ad testificandum²⁵⁴ for Kennedy, who was in custody in Nebraska, seeking information as to statements against interest at the time of the search. Her counsel never made any attempt to interview Kennedy, however, so they had no idea whether Cornell would testify or not, and the trial court eventually refused to allow him to be brought to the trial without that information.

Barry-Scott also argued that Officer Solic's testimony concerning the controlled buys should be excluded, because Westin could not be found. The trial court permitted the officer "to testify about the investigation upon which the search warrant was based, what Solic personally heard and observed during the transactions, and the procedures employed for the controlled buys." She also argued that the search warrant was invalid because the judge who signed it had represented her in the past. The Court, however, found that the affidavit provided sufficient probable cause and denied all of the suppression motions.

Barry-Scott was convicted, and appealed.

ISSUE: May officers provide hearsay testimony as background?

HOLDING: Yes (but use caution)

DISCUSSION: Barry-Scott argued that her right to confrontation witnesses was violated because "Westin, the [CI], was not called to testify." The prosecution countered that Officer Solic's testimony was "not offered for the truth of the matter asserted but rather only as background as to how the investigation developed." The Court reviewed the issue, and found that "[s]ome of the out-of-court statements about which Barry-Scott complains do not present Confrontation Clause problems because they are not hearsay because the declarant's testimony was not being used for the truth of the matter asserted." Officer Solic testified as to statements that he, himself, heard and they "were not being offered for the truth of the matter that drugs were being purchased." Other statements, however, "were testimonial in that they were given to police as part of interrogation or questioning of Westin following the buy transactions." The Court noted that "Crawford clearly holds that statements resulting from police questioning are testimonial." "The only purpose of the statements by Westin to the police officers was that those statements be used against the

²⁵³ Durkin had represented Barry-Scott and her husband "on similar but unrelated charges" when he was in private practice.

²⁵⁴ A court order to produce a prisoner in custody so that they might testify in another's case.

accused in investigating and prosecuting the crime.” As such, “Westin’s statements to the officers fit the definition of testimonial out-of-court statements as established in Crawford and Johnson.”²⁵⁵

The Court noted that Solic testified that he saw a car registered to Barry-Scott drive up to Westin, and, after Westin entered the car, the officer heard Westin talking with Barry-Scott about purchasing crack cocaine. Westin’s statement thus placed Barry-Scott at the scene of the second controlled purchase.”

However, the Court was troubled by several of the statements admitted by the trial court, as they did “appear to have been proffered to prove the truth of the matter asserted, rather than simply as background.” The Court found that “there being no question that Barry- Scott did not have an opportunity to cross examine the confidential informant, the statements should have been excluded, and Barry-Scott’s Sixth Amendment right to confrontation was violated.” However, the Court found any error was harmless.

With regards to the warrant, Barry-Scott argued that the judge was aware of her prior drug activities, but the trial court’s decision in that regard was upheld. (In particular, the Court noted that the officers were unaware of the judge’s connection to Barry-Scott, and an “alleged bias thus could not have impacted the officers’ activity.”)

Barry-Scott’s conviction was affirmed.

EVIDENCE - EXPERT WITNESS

U.S. v. Harvey

2007 WL 1339837 (6th Cir. Tenn. 2007)

FACTS: On Feb. 9, 2004, Detective Ashburn (Hamilton County Sheriff’s Office, OH) searched Harvey’s home, pursuant to a warrant. The items searched related to methamphetamine production. Detective Ashburn testified at trial as an expert in methamphetamine trafficking. Harvey was convicted, and appealed.

ISSUE: May officers testify as expert witnesses?

HOLDING: Yes (if properly qualified)

DISCUSSION: The only issue in controversy in the appeal was whether the methamphetamine found in the search was for personal use or was to be trafficked. Harvey objected to Detective Ashburn’s testimony, as an expert witness, on that issue. The court noted, in U.S. v. Bender, that police officers were permitted “to testify as expert witnesses about criminal activity since knowledge of such activity is generally beyond the understanding of the average layman.”²⁵⁶ The Court detailed Detective Ashburn’s credentials, which included 13 years of law enforcement experience and 4½ years of narcotics investigations including 100 methamphetamine cases. Detective Ashburn “testified that he had observed notations made with prices charged for drug amounts in other investigations and that the note found in [Harvey’s] wallet was consistent with such records.” In addition, Detective Ashburn noted the “significance of coffee filters containing methamphetamine residue at [Harvey’s] residence” and Harvey argued that this evidence was

²⁵⁵ See Cromer, *supra*.

²⁵⁶ 265 F.3d 464 (6th Cir. 2001).

irrelevant in proving distribution. The Court agreed, however, that the evidence was indicative of an intent to distribute quantities of the drug.

The Court concluded that the trial court was correct in admitting Detective Ashburn's expert testimony.

Ferensic v. Birkett

501 F.3d 469 (6th Cir. 2007)

FACTS: Ferensic was identified by the two elderly victims of a robbery, as one of two perpetrators. They had described the perpetrators and a sketch had been made. An officer recognized Ferensic from the sketch and prepared a photo array, including his photo, but only one of the two victims could identify him. They both identified him at a live lineup and when he was present at his preliminary hearing. These identifications were the only evidence that Ferensic was involved, but he was indicted.

Prior to the trial, Ferensic filed a motion that he intended to use an expert witness in suspect identification, but failed to share the expert's report in a timely manner, as required by the court. (Apparently the expert did not submit the report early enough to meet the court's deadline.) As a result, the expert was excluded from the trial.²⁵⁷

Ferensic was convicted and appealed through the state system. When the conviction was upheld, he request habeas from the federal courts. The District Court found that the exclusion of the expert, and another witness, substantially impacted Ferensic's ability to present a defense, since the evidence against him was based solely on multiple eyewitness identifications. The expert's testimony "would have informed the jury of *why* the eyewitnesses' identifications were inherently unreliable." The Government appealed.

ISSUE: Is expert testimony on eyewitness identification admissible?

HOLDING: Yes

DISCUSSION: The Sixth Circuit noted that the "significance of Dr. Shulman's testimony cannot be overstated." The Court stated that "eyewitness misidentification is 'the single most important factor leading to wrongful convictions in the United States.'" The decision of the District Court, to grant the habeas, was affirmed by the Sixth Circuit.

U.S. v. Holloway

2007 WL 4395579 (6th Cir. Ky. 2007)

FACTS: On January 14, 2005, Officer Masterson (Lexington PD) stopped a vehicle for "disregarding a traffic light." The driver, Holloway, put his hands out the window. Officer Masterson "observed a large amount of smoke escaping" through the open window." Holloway admitted to having

²⁵⁷ The expert had previously testified "that several factors, such as divided attention, stress, passage of time, photo arrays, collaboration of witnesses, and social conformity, affect memory. He noted that crime produces stress, which makes high resolution (detailed) memory of faces difficult. He opined that the guns carried by the robbers in this case were the most distracting factor, because a person's attention is directed to a weapon. "Sticky attention" to a weapon reduces the ability to recall details and leads to inaccurate identification. ... In addition, gaps in memory are filled in by world knowledge, post-event information, inferences, and talking to other witnesses.

smoked marijuana, and was arrested for DUI. His female passenger, who also appeared to be intoxicated and was found to be in possession of a crack pipe, was also arrested.

During the search of the vehicle, the officer found bagged marijuana and crack cocaine, rolling papers and cash, along with a weapon and three cell phones. When one of the phones rang, an officer answered it and a male voice asked for a \$50 rock. Later investigation indicated that Holloway owned the account to which the phone was connected, and Christine Kirkland controlled the account from which the call was made. Five more calls were made between the two numbers, between midnight and 2 a.m., and it was later shown that the calls were probably made by the cell phone owner's grandson, Jeff Kirkland.

Holloway was charged with possessing cocaine with the intent to distribute, as well as for possession of the weapon, as he was felon. He was convicted, and appealed.

ISSUE: Are officers permitted to testify as experts about drug trafficking?

HOLDING: Yes

DISCUSSION: Holloway objected to the Sgt. Ford's testimony that "Holloway's conduct was consistent with distribution." Holloway argued that it was improper to admit testimony as to his mental state, as a violation of Rule 704(b). The Court noted that officers "are routinely allowed to testify that circumstances are consistent with distribution of drugs rather than person use."²⁵⁸ Quoting from U.S. v. Combs, the Court noted that officers would be permitted to testify "regarding conduct that would be consistent with an intent to distribute and left to the jury the final conclusion regarding whether Combs actually possessed the requisite intent."²⁵⁹

The Court agreed the testimony was properly admitted, and upheld the conviction.

EVIDENCE - CONFESSION

U.S. v. Cody
498 F.3d 582 (6th Cir. Tenn. 2007)

FACTS: In February, 2004, two robberies occurred in Greene County, Tennessee, one involving a bank. Cody quickly became a suspect, along with his wife, Linda, and his son, Marshall. Cody was arrested, and made several statements. A few weeks later, he was taken from jail to the hospital, and escaped, "assaulting and seriously injuring several hospital employees and a corrections officer in the process." He was captured within the day, and the gun he had stolen from the corrections officer was retrieved.

Cody was charged with the robberies, tried, and rapidly convicted. He appealed.

ISSUE: Does intoxication invalidate a confession?

HOLDING: No

²⁵⁸ U.S. v. Swafford, 385 F.3d 1026 (6th Cir. 2004).

²⁵⁹ 369 F. 3d 925 (6th Cir. 2004).

DISCUSSION: Cody argued that the statement he made at the Greene County SO, following his arrest, should be suppressed because they were “not ‘voluntary’ in light of the suicidal tendencies that he was experiencing, and that he voiced, at the time. The Court, however, noted that the U.S. Supreme Court had “explicitly declined to hold that ‘a defendant’s mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional ‘voluntariness.’”

Cody also argued the admission of his statement in which he expressed “a desire to commit suicide” was improper. The trial court had considered it to be an admission of guilt in the underlying crime, as he referenced his inability to “live in prison” in the suicide threat. Previous courts had found that a suicide threat is a “form of flight” and such statements are admissible.

Further, Cody argued that the Greene County investigators had “collected two videotapes from a convenience store’s surveillance cameras with the hope that they would help to reveal the identity of the Green [sic] County Bank robbers.” However, the tapes were apparently never logged as evidence and could not be found. An investigator stated that they had been found to have been of no evidentiary value. Cody argued that the failure to preserve the tapes was in bad faith.²⁶⁰ The Court, however, found that not to be the case, in that the tape in question would not have directly involved the robbery in the bank, but only the possible disposal of some of the dye-stained money.

Cody’s conviction was affirmed.

SIXTH AMENDMENT

Van Hook v. Anderson
488 F.3d 411 (6th Cir. Ohio 2007)

FACTS: In 1985, Van Hook was arrested in Ft. Lauderdale, Florida on suspicion of a horrible murder that had occurred two months earlier, in Cincinnati. The Florida officers who arrested him gave him Miranda warnings. Van Hook initially agreed to talk, but then stated “[m]aybe I should have an attorney present.” Believing that he was asking for a lawyer, the officers did not further question him.²⁶¹

Cincinnati PD Detective Davis arrived in Ft. Lauderdale to transport Van Hook back to Ohio. At that time, Van Hook did not yet have an attorney. Detective Davis talked to him about the extradition and told Van Hook that they “had a lot to talk about” but that Van Hook would have to initiate any discussion. Van Hook stated that his mother had told him to tell the truth (something the detective already knew), and that he wanted to talk. He was given his Miranda rights, waived them and then gave a “full and graphic confession.”

²⁶⁰ See Arizona v. Youngblood, 488 U.S. 51 (1988).

²⁶¹ The Court noted that: “In 1985, the officers did not have the benefit of the Supreme Court’s decision in Davis v. United States, 512 U.S. 452 (1994), when the Court made clear that a suspect in custody must “unambiguously request counsel,” *id.* at 458, and that “maybe I should talk to a lawyer” is not an unequivocal request, *id.* at 462. In 2007, Van Hook’s statement might well not have sufficed to require that questioning be stopped. The officers did, however, understand Van Hook to have asked for a lawyer, and stopped any further questioning of him based on his statement.”

Van Hook was indicted on murder and robbery. He moved to suppress the confession, but the Court noted that although he had invoked his right to counsel, he had initiated the discussion with the police. The Ohio Court admitted the confession. He claimed temporary insanity in the homicide, but the jury both convicted him and recommended capital punishment.

Van Hook appealed through the state courts and the federal courts, and through a lengthy process, and several changes in procedural law.

ISSUE: May a third party tell police that a suspect (who has invoked counsel) wishes to talk to them?

HOLDING: Yes

DISCUSSION: Van Hook argued that his confession should have been suppressed under Edwards v. Arizona.²⁶² The Court agreed that a "confession [must] be voluntary to be admitted into evidence."²⁶³ Further, the Court stated that:

The rule of Edwards embodies two independent inquiries: First, courts must determine whether the accused actually invoked his right to counsel. . . . Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.).

The Court noted that the gravamen of Van Hook's claim is that he did not, under the law initiate "further discussions of the police." It stated that if the record had shown that "Detective Davis - unprompted - initiated the discussion, the confession would likely have to be suppressed." The Court framed the question - that the "facts in this case required [the Court] to resolve first the legal question whether a suspect can initiate discussions with police through a third party." He argued that only the suspect "himself" can "communicate a willingness and a desire to talk with the police."

The Court, however, found "no sound justification for reading the statement from Edwards that the suspect 'himself' must initiate a discussion to imply the suspect, and only the suspect, can inform the police he wants to talk."

INTERROGATION - MIRANDA - QUARLES

U.S. v. Williams

483 F.3d 425 (6th Cir. Tenn. 2007)

FACTS: On the day in question, Officer Jackson and other Memphis (Tenn.) PD officers went to arrest Williams. When the officers arrived, they knocked on Williams' door but the man who responded did not look like the photo they had of Williams. (He was, in fact, Williams, however.) The man offered to retrieve his ID, which was in the pocket of his pants, on the floor. The officers then entered the room and asked if anyone else was there, and if "he had any weapon." The man stated that was "an old gun under his bed" -

²⁶² 451 U.S. 477 (1981).

²⁶³ Dickerson v. U.S., 530 U.S. 428 (2000)..

specifically, under the mattress. Jackson handcuffed Williams while another officer retrieved a sawed-off shotgun from that location. (Williams, however, stated that he was placed in a chair in the hallway, and that the officers searched his room. He claimed the officers never asked him for ID.)

The District Court opinion had internal inconsistencies and was “not wholly clear as to whose account it credited.” However, it did grant Williams his request to suppress the gun, and the government appealed.

ISSUE: May the public safety exception (under New York v. Quarles) permit a subject in custody to be questioned about firearms before being given Miranda?

HOLDING: Yes

DISCUSSION: The Court noted that under the usual rule of Miranda, statements made during a custodial interrogation may not be used unless the Miranda warnings are given. “However, when officers ask ‘questions necessary to secure their own safety or the safety of the public’ as opposed to ‘questions designed solely to elicit testimonial evidence from a suspect,’ they do not need to provide the warnings required by Miranda.” In this case, the government argued that the “statement [about the gun was] admissible under the public safety exception announced in [New York v.] Quarles.”²⁶⁴

A Quarles evaluation:

... takes into consideration a number of factors, which may include the known history and characteristics of the suspect, the known facts and circumstances of the alleged crime, and the facts and circumstances confronted by the officer when he undertakes the arrest. For an officer to have a reasonable belief that he is in danger, at minimum, he must have reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it. The public safety exception applies if and only if both of those two conditions are satisfied and no other context-specific evidence rebuts the inference that the officer reasonably could have perceived a threat to public safety.

In this case, the Court could not determine whether the officers would have had reason to believe “that someone other than police could access the weapon and inflict harm with it.” Because the facts had not been adequately developed in the prior proceedings, the Court was not able to determine if Williams was restrained or unrestrained. If he was restrained, the Court noted, there could be no objective concern that someone might access a weapon, but had he been unrestrained, the Court acknowledged, the Quarles exception might apply. The Court stated that “[a]n officer may rely on the public safety exception only if he has a objectively reasonable belief that he is in danger.”

The case was remanded to the District Court to permit it to “make the factual finding necessary to determine whether the public safety exception applies.”

²⁶⁴ 467 U.S. 649 (1984).

SUSPECT IDENTIFICATION

Drew v. Parker

2007 WL 1748135 (6th Cir. Tenn. 2007)

FACTS: On June 16, 1995, Capley was working at a market in West Nashville. Earlier that same day, she had spotted Drew purchasing a bottle of wine and spoke to him briefly. At the market, she was waiting on a woman when Drew joined the line. Capley had just opened a new bundle of cash, approximately \$2,000 and added it to the drawer. When she opened the drawer, Drew “reached over the counter and took a handful” of cash. Capley screamed and chased Drew from the market. The owner, Sigley, did not see the actual robbery but witnessed Drew, with money in his hand, running from the store. Two other witnesses joined Capley in chasing Drew to a “nearby field that surrounded an abandoned grain silo.”

Officer Burnette responded to the call. Capley described the thief as a “black male wearing a white-colored shirt and blue jeans.” Sigley described him as wearing a “light-colored shirt and dark pants, and stated he had a “very identifiable face” and had “that he had stood in line for at least a couple of minutes, which provided a good opportunity to look at him.”

After a lengthy search, Officer Burnette found Drew hiding. Drew was a black male, wearing a white shirt and dark pants, and had \$260 in 20-dollar bills in his pocket. Officer Burnette arrested Drew and brought him back to the market, where the officer “asked each witness to walk by the police car and determine if they could identify the man in the car.” Each witness independently identified Drew. However, it was noted that it was believed that approximately \$2,000 in 20-dollar bills was taken in the robbery.

Drew was indicted and argued that the “showup identification was impermissibly suggestive and as tainting any subsequent in-court identifications.” However, the trial judge, relying on Neil v. Biggers,²⁶⁵ denied Drew’s motion to suppress. Eventually, Drew was convicted, and appealed. After a complicated series of proceedings, the Sixth Circuit accepted the case on a habeas petition.

ISSUE: Is a suggestive, but reliable, identification admissible?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court reviewed the law on showup identification and noted that “even if the confrontation is suggestive, an identification will be admissible if it is reliable.” He argued that the officers “inappropriately played to the witness’s fears’ because as far as the witnesses knew, [Drew], who apparently had reason to hide from the police, would be released absent their identification.” He also argued that the identification “failed to satisfy the reliability criteria of Biggers” by questioning the degree of attentiveness of the two witnesses prior to the crime. The Court, however, noted that both women did have at least a few minutes to view the suspect, and that they both identified the thief’s clothing and Sigler described his face in detail. He complained that the description was “fairly vague,” but again, the Court discounted that. The Court noted that the witnesses were both very confident in their identification,

²⁶⁵ 409 U.S. 188 (1972).

another factor in Biggers, and also cited the short time frame, two hours, between crime and identification. The Court found no reason to find that delay to be significant.

Drew's conviction was affirmed.

FIRST AMENDMENT

Helms v. Zubaty

495 F.3d 252 (6th Cir. Ky. 2007)

FACTS: On July 15, 2004, Helms went to the office of the Gallatin County Judge-Executive, Zubaty, to complain about a "proposed county payroll tax." She learned from Chipman, the receptionist, that Zubaty was out of town. Chipman, who knew Helms, agreed to let her sit in the office for a while, and Helms "launched into a criticism of the proposed tax" and proceeded to get "kind of worked up" about it.

Baker, another county official, returned from lunch and heard Helms' railing about the tax, and stating that she wasn't going to leave the office until she got her money back. When he heard her call Zubaty a foul name, he "walked out into the reception area and asked Helms to leave, telling her she was disrupting the office." He stated that he could not return necessary phone calls due to her loud conduct.

When Helms refused, Baker called 911 to report a "disruptive person." Officer Caldwell (Warsaw PD) responded, and Chipman explained what had occurred. After further discussion, and Helms' continued refusal to leave, Caldwell arrested her for 2nd Degree Criminal Trespass.

Helms was acquitted, and filed suit against Zubaty, Baker and Caldwell, along with the Police Chief and Mayor of Warsaw. The District Court granted all defendants summary judgment and Helms appealed.

ISSUE: Is a government official's office suite a "nonpublic forum" for First Amendment purposes?

HOLDING: Yes

DISCUSSION: The Court started its analysis by noting that the "Supreme Court has recognized the government's need to maintain its property for the use to which it is lawfully dedicated." In the past, the Court "has identified three types of fora: the traditional public forum, the designated public forum, and the nonpublic forum." Simply because a "property is owned or controlled by the government" does not make it a public forum under the First Amendment. Even though Zubaty had stated that his office was "always open to the public" the Court did not find that converted the space to a "public forum" and subject to "prolonged sit-ins, particularly when the public official with whom the citizen wishes to speak is not there."

The Court concluded that the space in question was properly considered a nonpublic forum.

Next, the Court found that the "government may lawfully restrict speech in a nonpublic forum so long as the restrictions are viewpoint neutral and reasonable in light of the purpose served by the forum." Baker's testimony "that he was unable to work while she sat talking loudly and swearing outside his door" were sufficient reasons to ask "Helms to leave the office."

On a side note, Helms argued that Caldwell's mention of the "payroll tax" as the reason for her arrest colored the arrest unlawful, but Caldwell testified that he had no idea of the reason for the actual dispute, but that simply he was acting because of Baker's complaints. Helms argued that because she was "not yelling and did not present a physical threat," she was not committing an offense. The Court agreed that Caldwell had probable cause to make the arrest, since "[c]riminal trespass concerns *presence*, not behavior." She refused several lawful orders to leave, including two from Caldwell.

The trial court's decision was affirmed.

EMPLOYMENT

Weisbarth v. Geauga Park District **499 F.3d 538 (6th Cir. 2007)**

FACTS: Weisbarth was hired as a part-time park ranger with the Geauga Park District (Ohio) in 1997 and became full time in 2003. She later became the park's official canine handler. At about that same time, the Ranger Department began to suffer from "serious morale and performance problems." A consultant was hired to evaluate the department, and as part of this process, he rode along with Weisbarth. During that ride, they discussed a "letter of counseling" that she had received, and she told him she intended to write a rebuttal. He told her that would be "unwise" and "contrary to 'team efforts.'" He asked questions, and she claimed that she attempted to answer the questions honestly. The consultant reported her comments, characterizing them as evidence that she disliked all of her co-workers.

Weisbarth later claimed that her statements caused the consultant to consider her a "source of friction" and that he "developed a 'strategy' for getting her fired." Shortly thereafter, Weisbarth had a family crisis that required a sudden departure, which she apparently failed to report to her supervisors. The GPD ordered her to be psychologically evaluated and she was found to be unfit – although another psychologist, provided by the union, found the opposite. A third psychologist agreed with the first and Weisbarth was fired in September 2004. Weisbarth claimed that this firing was in retaliation for her "allegedly protected speech" during the ride-along.

Weisbarth filed, and won, in a grievance hearing. The arbitrator suggested they work out a separation agreement, and the record is silent as to Weisbarth's employment status at the time of this opinion.

Weisbarth filed suit under 42 U.S.C. §1983, claiming violations of her First Amendment rights. The District Court developed a number of occurrences, both before and after the ride-along, that "caused the deterioration of Weisbarth's relationship with the GPD." Eventually, the District Court dismissed her complaint, and she appealed.

ISSUE: Is it a violation of the First Amendment to discipline an employee for statements made in their line of work?

HOLDING: No

DISCUSSION: The Court limited its evaluation of the appeal to the First Amendment issues. The Court noted that previous cases had held that to meet the threshold, the employee "must have spoken as 'citizen'"

and must have 'address[ed] matters of public concern.'" ²⁶⁶ During the pendency of the action, the Court decided Garcetti,²⁶⁷ and the District Court "apparently concluded that Weisbarth's talk with [the consultant] was not explicitly part of her official job description as a park ranger." The District Court "expressed concern that 'expanding' Garcetti to preclude First Amendment protection in this case would permit employers to hire consultants to 'solicit statements from employees that then could be used against the employee.'" However, the District Court found that even if it did occur pursuant to her official duties, "the speech simply did not address a matter of public concern."

The Sixth Circuit reviewed the lower court's decision. It determined that because Weisbarth was speaking as a ranger, she was not speaking as a citizen. It was the consultant's job to interview Weisbarth about morale and performance issues. Weisbarth argued that this was not part of her official job duties as a park ranger – but the Court concluded that, pursuant to Garcetti, such statements owed their "existence to [her] professional responsibilities." The Court looked, specifically, to the recently decided case – Haynes v. City of Circleville.²⁶⁸

The Sixth Circuit noted "an additional policy concern about dismissing Weisbarth's claim based on Garcetti," however. The Court feared that "[s]uch a holding" ... " would permit government employers to solicit statements from employees on any range of personal or political issues – ostensibly pursuant to their official duties – and then use those statements against them."

The Sixth Circuit, however, found that "[a]lthough firing Weisbarth based on her assessment of department morale and performance may seem highly illogical or unfair, the relevant question is whether the firing violated her free-speech rights under the First Amendment." The Garcetti Court had noted that there were other checks in place to protect employees who report wrongdoing, such as whistleblower statutes. "Thus," the Court noted, "although taking action against a public employee for speech made pursuant to official duties might give rise to antidiscrimination, whistleblower, or labor-contract claims, it does not violate the First Amendment."

The District Court's decision was affirmed.

EMPLOYMENT - RETALIATION

Denhof/LeClear v. City of Grand Rapids (Michigan) 494 F.3d 534 (6th Cir. 2007)

FACTS: Denhof and LeClear, both female officers with Grand Rapids, Michigan, PD, were both plaintiffs in a lawsuit filed in Jan., 2001, in which nine female officers "claimed gender discrimination, retaliation and harassment in connection with their employment." As a result of that lawsuit, later that year, they claimed that they were subjected to ongoing retaliation for the lawsuit. The trial judge, however, denied their requested injunction, as he "cast doubt on the veracity of all Denhof's allegations and labeled her story of being followed a 'gross exaggeration.'"

²⁶⁶ Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

²⁶⁷ Garcetti v. Ceballos, --- U.S. --- (2006).

²⁶⁸ 474 F.3d 357 (6th Cir. 2007).

Shortly after that hearing, Chief Dolan asked about a “fitness for duty” evaluation for Denhof, as certain of her statements during the proceeding could be read as a threat against other members of the department. She was placed on paid leave and eventually, Denhof was found to be “unfit for duty” by the department psychologist. She, however, countered with other evaluations that disagreed with the first evaluation, and which found her “fit for duty.” The City, however, converted her to unpaid leave and eventually terminated her, for her alleged failure to agree to treatment. (Denhof argued, however, that she had never been told that she needed treatment by anyone, and that the department psychologist had refused to talk to her when she arrived at his office with her attorney.) Over the next several months, three psychologists (one of the department’s and two of her own) argued over her need for treatment and/or medication. Eventually, she was allowed to stay on unpaid status, and she worked part-time at several jobs, including as a part-time officer in a city some 90 minutes from her home.

LeClear was also a Grand Rapids officer. She had been involved in an on-duty shooting and was eventually found to have symptoms of Post-Traumatic Stress Disorder (PTSD), for which she received treatment. As a result of the reports from that treatment (which the city received as discovery in the ongoing lawsuit), the City requested a fitness for duty exam. (There were, apparently, no obvious issues with her job performance.) She was ordered to undergo the evaluation and placed on paid leave. The department psychologist doubted that she had PTSD but instead, diagnosed her with a Personality Disorder. As a result, she was switched to unpaid leave. She submitted the reports of her own doctors (the same doctors that evaluated Denhof), both of whom found her fit for duty. She was ordered to report to the department psychologist for treatment options. When she arrived with her attorney (as Denhof had), the doctor “cracked the door to his office just wide enough to tell LeClear that he did not have any treatment recommendations for her and that her appointment had been cancelled.” He filed a report a few weeks later suggesting psychotherapy, which he seemed to indicate could be provided by her own doctors. However, her own doctors disagreed and dispute the department psychologist’s recommendations. One of the doctors specifically found her fit for duty. She also ended up working part-time for the same agency as Denhof.

Both officers sued for retaliation. At trial, the jury returned a verdict in their favor, ordering \$1 million in damages and back/front pay. Despite that verdict, however, the Court ordered a judgment as a matter of law in favor of the City. The officers appealed.

ISSUE: Is reliance upon a doctor’s recommendation always reasonable?

HOLDING: No

DISCUSSION: The Court discussed how a plaintiff might establish a retaliation case. It noted that “[t]o establish a case under the burden shifting method, a plaintiff must show: 1) she was engaged in a protected activity, 2) the employer was aware of the protected activity, 3) she suffered an adverse employment action and 4) there is a causal connection between the protected activity and the adverse employment action.”²⁶⁹ When the plaintiff makes this case, the burden then goes to the employer to “provide a legitimate, non-discriminatory reason for the challenged action.” Once that is done, the burden goes back to the plaintiff to “show by a preponderance of the evidence that the [employer’s] stated reason 1) has no basis in fact, 2) did not actually motivate the adverse action or 3) was insufficient to motivate the

²⁶⁹ Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555 (6th Cir. 2004).

adverse action.” One defense for the employer is that they took actions based upon an “honest belief” in a third party’s recommendation, such as the department psychologist in this case.

In this case, the trial court found that the chief reasonably relied upon the psychologist’s recommendations. However, the appellate court found that that a jury could conclude that reliance was unreasonable. It specifically noted that the doctor’s recommendations in writing seem to indicate that he was predisposed to find her unfit for duty, as he stated that he could not see how Denhof could continue with the department. In particular, the Court noted that even though the Chief stated that Denhof was a “danger to herself and others,” in Dec., 2001, he waited six weeks before taking her off the streets.²⁷⁰ His motives were also called into question by his delay to take the department psychologist’s recommendation to send LeClear for evaluation with a PTSD specialist, and a jury “could have reasonably concluded that [the Chief’s] actions were inconsistent with his professed motivations.”

The doctor’s refusal to talk to the officers, when they arrived with legal counsel, even when that counsel was going to wait outside the office, also indicated that the City’s reliance on his advice was misplaced. The Court noted that the officers were both told they would be terminated before they were given any treatment options, and in the case of Denhof, when she was specifically told she’d refused treatment, when in fact, she hadn’t been offered any. The court found “that the city was proceeding without all the facts, and certainly provided the jury a basis to conclude that the city’s goal in this entire process was to terminate the plaintiffs in retaliation for this lawsuit.”

The court also noted that the city failed to respond when both officers submitted reports from their own doctors, and when they continued to work with those doctors, as ordered. (Both doctors filed reports that no treatment was recommended and there was “nothing wrong with them.”) The city allowed both officers to remain suspended without pay and its “lack of response provided a more than sufficient basis for the jury to conclude that the city was not acting out of concern for its employees, but instead was doing whatever it needed to do to prevent the plaintiffs from returning to work.”

The court reversed the trial court, but reduced the compensatory for each officer to \$350,000 - as the jury’s decision was actually in excess of what the officers requested. The Court upheld the awards for front and back pay, however.

EMPLOYMENT - SEXUAL HARASSMENT

Larocque v. City of Eastpointe (Michigan) 2007 WL 2426441 (6th Cir. 2007)

FACTS: Larocque was a civilian employee of the Eastpointe PD, working as a part-time Code Enforcement Officer. She reported to and was supervised by a sworn chain of command, and her immediate supervision was provided by whichever administrative officer was on duty at the time.

In the fall of 2003, Larocque stated that she was sexually harassed by members of the PD, in the building. In one case, she overheard two officers making sexual comments about her. She became upset and left work, claiming illness. A week later, a police corporal asked her why she had left, and she told him. He stated he would speak to the officer, but did not.

²⁷⁰ There was a similar delay in suspending LeClear.

About two months later, Larocque claimed that she spoke to the officer who had made the sexual comments, while they were both in their respective vehicles in the parking lot. She claimed the officer made comments about her sexual history with other officers, and that she was trying to ruin another officer with whom he claimed she had a sexual relationship. She reported that incident to another corporal, but he took no action.

However, apparently a report of some type did occur, because a few days later, the Chief called a meeting with Larocque and two officers he assigned to investigate the problem. Larocque was instructed to put her complaints in writing. The officers investigated the allegations using a variety of sources. They eventually concluded that her first complaint couldn't be proven or disproven, either way, and that the second was not supported by videotape.²⁷¹ (At some point, Larocque stated she'd given them the wrong date for the second occurrence.) One of the investigators did state that the immediate supervisors did fail to properly follow up on her reports.

In July, 2004, Larocque was charged with misconduct and terminated, the allegations being that "she had made false verbal and written reports about the conversation she'd alleged with the officer in the parking lot." Following a hearing, her termination was upheld.

Larocque filed suit, alleged sex discrimination and a hostile work environment. The trial court found in favor of the City, and she appealed.

ISSUE: May an employee bring an action for retaliation, if adverse action against the employee appears to be related to a complaint?

HOLDING: Yes

DISCUSSION: The Court began with reviewing the standard for an employee to make a "prima facie case of hostile work environment based on sexual harassment by a co-worker."

- (1) [the plaintiff] was a member of a protected class;
- (2) [the plaintiff] was subjected to unwelcome harassment;
- (3) the harassment complained of was based upon sex;
- (4) the harassment unreasonably interfered with the plaintiff's work performance or created a hostile or offensive work environment that was severe and pervasive; and
- (5) the employer knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action.²⁷²

The Court found that the first three elements were undisputed. Larocque did not argue that the harassment affected her job performance, and in fact, she had a "solid performance record." The Court found that she did not "establish that a reasonable person would consider the environment objectively hostile." The hallway comments, in the first incident, were not directed to her and there was no indication that the officers involved knew she was close by - and appeared to be "no more than a mere utterance."

²⁷¹ The investigators apparently reviewed security videotape of the parking lot where the interchange had taken place.

²⁷² Fenton v. HiSAN, Inc., 174 F.3d 827, 829-30 (6th Cir. 1999).

The second incident also, did not “demonstrate an objectively hostile environment.” She did not work with the officers in question daily, only when the occasional call would bring them to the same location. Even accepting that the officer made an “offensive utterance” to her, it did not rise to the level of a physical or verbal threat.

As such, the Court found that the City’s was properly entitled to summary judgment.

However, Larocque also argued that the City retaliated against her. To make a prima facie case on that cause of action,

... a plaintiff must show that:

- (1) he/she engaged in a protected activity;
- (2) the defendant had knowledge of the protected conduct;
- (3) the defendant took an adverse employment action against the plaintiff; and
- (4) a causal connection existed between the protected activity and the adverse employment action.²⁷³

Again, the burden then shifts to the employer, to make a “legitimate, nondiscriminatory reason for the employer’s actions.” The burden goes back to the employee to demonstrate pretext. In this case, the Court found that Larocque made a prima facie case of retaliation, as she had reported “perceived sexual harassment to her supervisor.” However, the Court found that the City’s reason for the termination was reasonable, that she had been dishonest in making the second claim. The Court found that Larocque did not successfully rebut that claim, and upheld the summary judgment for the City on the retaliation claim.

EMPLOYMENT - HOSTILE WORK ENVIRONMENT

Austion v. City of Clarksville (Tenn.) **2007 WL 2193597 (6th Cir. 2007)**

FACTS: In 1991, Austion, an African-American male, began working for the Clarksville, Tenn. PD. During the ensuing years, Austion became a K-9 handler, but was demoted due to performance deficiencies, in 1998. In 2001, an officer, never identified, hung a noose at a workstation at the PD, where it hung until another officer complained to the NAACP - and they intervened on behalf of the officers.

In Sept, 2001, Austion sought promotion to sergeant. Austion met the requisite test scores, but the Chief denied the promotion, citing performance and motivation issues. Eight others were promoted, including three African-American officers. Austion was promoted to detective in March, 2002, and again applied for a sergeant’s position, in May. This time, a Caucasian officer was promoted. A few months later, Austion filed for discrimination with the EEOC, and the EEOC issued a right to sue letter.

In Jan, 2003, Austion’s sergeant put him in for a written commendation. When that was not processed, the sergeant asked about it, and was told that the “commendation was delayed because Austion ‘was going through some things right now.’” The sergeant interpreted that “comment to imply that the commendation was delayed because of Austion’s EEOC charge.”

²⁷³ Weigel v. Baptist Hosp. of East Tennessee, 302 F.3d 367,381 (6th Cir. 2002) (applying the factors from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), to a retaliation claim).

During that same time, Capt. Brooks, the command officer that made the comment, circulated a letter that defending the chief, and which tagged the employees who had filed complaints as “complainers” and “disgruntled employees.” Several officers contacted the Human Resources Director, who instructed the Chief to stop the distribution of the letter, but the Chief refused.

In May, 2003, the Chief told Austion, among others to “remove potentially offensive items from the workplace.” Austion, specifically, was told to remove a figurine of a “tribesman on a motorcycle.” A few days later, Austion went to the Chief about rumors involving himself (Austion) and the Chief “told him he was not allowed to talk unless he was given permission.” The Chief was accompanied by his entire command staff, and made a number of comments. (Unbeknownst to the Chief, Austion was taping the interaction.) Austion filed another action with the EEOC, and they again gave him a right to sue letter.

In Oct. 2003, Austion’s on-call schedule was changed, which required, essentially, Austion to work from 8 a.m. until 4 p.m., and then to remain on call until 3 a.m. In Sept., 2004, Austion was suspected of firing shots at an officer’s home - a Caucasian officer who had supported Austion and others - in an effort to “support their hostile work environment claims.” Austion was ordered to submit his weapon for testing. (Apparently, no match was found.)

Austion sued, and eventually, the case went to trial. Austion introduced evidence “that supervisory officers used racial slurs throughout the department.” CPD hired consultants to evaluate and “neutralize any racial hostility in its workplace.” The jury found that Clarksville bore liability for demoting Austion in 1998, failing to promote him in 2001/02, creating a hostile work environment and retaliating against Austion for protected activity.” Clarksville appealed.

ISSUE: May a change in schedule constitute a retaliatory action?

HOLDING: Yes

DISCUSSION: The Court found that some of the claims were untimely filed, but found that the hostile work environment claim and the retaliation claim, was, in fact, filed in time. In that type of case, he could reach back and use the other claims as background evidence to support it, as well.

The Court found that the “collective import of all these incidents - most of which both Austion and CPD had knowledge of - provide adequate evidence for the jury to infer that a racially hostile work environment existed and that Austion was subjectively affected by this environment.” The Court found the evidence to be “somewhat meager,” but not so meager that a jury could not reasonably accept it.

Further, the Court found that Austion’s change in on-call schedule, as well as their targeting him in the shooting (apparently unproven) was an adverse job action sufficient to suggest retaliation.

The court reversed the judgments originally rendered on the issues deemed untimely, but affirmed the hostile work environment and retaliation claims, along with the awards for those cases.

EMPLOYMENT - FIRST AMENDMENT

See v. City of Elyria

502 F.3d 484 (6th Cir. 2007)

FACTS: See started work as a patrol officer for the Elyria PD in 1993. In April, 2001, “See contacted the FBI to report alleged illegal or immoral activity within the police department.” Three other officers, including a lieutenant, also discussed the allegations with the FBI. “No official resolution of See’s complaint to the FBI has ever been issued, and no charges have ever been filed.”

In September 2001, “See was charged with several rule violations concerning a citizen complaint” as well as issues with his behavior concerning that complaint. The Chief, Medders, who was involved in the allegations put before the FBI, recommended a 45 day suspension. Following a hearing, the Director suspended See for 30 days. See filed a grievance, and the suspension was reduced to 15 days. Six months later, charges were brought against him for insubordination, and Medders recommended termination. The Director upheld the termination. See again grieved the action and the “arbitrator found that See had engaged in insubordination, but because See ultimately performed his duties, he did not violate rules against unbecoming conduct and unsatisfactory performance.” The arbitrator reduced the punishment to 30 days and See was reinstated.

See filed suit against the City and Chief Medders, claiming violations of his First and Fourteenth Amendment rights.²⁷⁴ Medders and the City requested summary judgment and the trial court partially granted that demand, but denied summary judgment “with respect to complaint to the FBI” and “on the retaliation claims to that extent.” Medders appealed.

ISSUE: Is an employee’s sharing matters of public concern protected under the First Amendment?

HOLDING: Yes

DISCUSSION: The Court reviewed the standard for First Amendment claims involving public employees and found that “as a matter of law, See engaged in constitutionally protected activity.” The matters that See discussed with the FBI “were matters of public concern as they involved alleged corruption in police department investigations, grand jury procedures, funding, and dealing with the press.” The Court noted that “[s]tatements exposing possible corruption in a police department are exactly the type of statements that demand strong First Amendment protections.” The Court further noted that there was no “evidence – and Medders does not assert – that See’s statements to the FBI were, in fact, deliberately or recklessly false and, therefore, outside First Amendment protections.” The Court found “no evidence that See’s complaints to the FBI actually impeded the police department’s general performance and operation or affected loyalty and confidence necessary to the department’s proper functioning.”

The Court found that See “sufficiently alleged conduct by Medders that, if proven true, would constitute a violation of his well-established First Amendment rights.” Further, the Court found that such rights were, in fact, well-established. The Court affirmed the trial court’s denial of summary judgment.

²⁷⁴ See’s wife also filed suit, claiming loss of consortium.

Haynes v. City of Circleville

474 F.3d 357, 25 IER Cases 1050, 2007 Fed.App. 0037P, (6th Cir. Ohio 2007)

FACTS: In 1996, Circleville PD created a canine unit. Haynes became a canine handler, and he and the agency had a "separate employment agreement to cover Haynes's duties as a canine handler." During the course of over three years, he generally spent 12 hours a week, on average, training with the dog, and 28 hours as a patrol officer. When he worked overtime, he was paid for it.

In 2000, Haynes resigned to serve overseas with the State Department, and returned the next year. He was rehired as a patrol officer and, according to Haynes, was also the administrator of the canine unit and a handler. In 2003, the police chief reduced the approved training time to only once every three weeks, and that the handlers were limited to eight hours, including travel time, to the training facility.

Haynes wrote a long memorandum detailing his concerns about the new training plan. The Chief offered him the choice of working within the parameters or resigning. During the same time frame, Haynes was called in to work a little early, and refused to do so. Haynes was then relieved of his duties as a canine handler, and ultimately, placed on administrative leave. Shortly thereafter, he was ordered to report for a psychological examination, and refused to do so until he'd sought the advice of an attorney.

On March 12, 2003, two days after his canine equipment had been collected, Haynes notified the Chief that he intended to file a grievance, but the record does not reflect whether this was, in fact, done. Eventually, a settlement was proposed whereby Haynes would no longer be a canine handler, but would continue as a patrol officer. Haynes argued that his memorandum was not intended to be insubordinate, but to cover him should problems arise later. Haynes was terminated on March 26, 2003.

Haynes filed suite under Ohio whistleblower law, as well as claiming a "retaliatory discharge based on the exercise of his First Amendment rights." The case was removed to federal court, and the defendants requested summary judgment. The U.S. District Court refused to grant qualified immunity to Chief Gray, and he appealed.

ISSUE: Is a memorandum to the Chief of Police protected under the First Amendment?

HOLDING: No

DISCUSSION: The Court noted that there is a "three-step test for analyzing a public employee's claim of First Amendment retaliation." First, it was necessary to show that the "speech at issue was protected" in that it both "touches on a matter of public concern" and that "his interest in the speech outweighs the government's countervailing interest in promoting the efficiency of the public service it provides as an employer." Next, Haynes must demonstrate "that his termination by Chief Gray 'would chill an ordinary person in the exercise of his First Amendment rights.'" Last, Haynes "must present sufficient evidence to create a genuine issue as to whether his speech was a substantial or motivating factor in the employer's decision to discipline or dismiss."

This case began before the decision in Garcetti v. Ceballos, which held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²⁷⁵

As a result of that case, the Court concluded that “Haynes ... has no First Amendment cause of action even if Chief Gray did fire him as a direct result of either the memo or the ill-fated ‘Christmas gift.’”²⁷⁶ Haynes speech was directly connected to his “official duties as a police officer” and as such, no “constitutional violation took place.”

The decision of the District Court was reversed, and the case was remanded with instructions to the trial court to dismiss the First Amendment claims.

²⁷⁵ 126 S.Ct. 1951 (2006).

²⁷⁶ Haynes packaged up his agency-provided canine gear in a box wrapped in Christmas paper when he was ordered to return it.

2006-07 Term

U.S. Supreme Court

Carey v. Musladin
127 S.Ct. 649 (2006)

FACTS: During Musladin's trial for murder, several members of the victim's family "sat in the front row of the spectator's gallery." During parts of the trial, the family members "wore buttons with a photo of Struder [the victim] on them." Musladin's counsel asked the court to have them remove the buttons, but the trial court refused, stating that it found "no possible prejudice to the defendant" in allowing the buttons to be worn.

Eventually, Musladin was convicted of murder. (He had admitted to killing Struder, but claimed self-defense.) He appealed his conviction through the state court system, arguing that "the buttons deprived him of his Fourteenth Amendment and Sixth Amendment rights." The state courts agreed with the trial court, finding no prejudice to Musladin in allowing the family members to show "normal grief" for their loved one. Musladin then filed for a writ of habeas corpus in the federal courts arguing that the buttons were prejudicial and denied him the opportunity for a fair trial. The U.S. District Court refused Musladin's petition for habeas corpus, and to review the case, but did permit Musladin to appeal the issue to the Ninth Circuit Court of Appeals.

The Ninth Circuit reversed the lower court's rulings, finding that the "test for inherent prejudice" used by the trial court was not in accord with clearly established federal law on the issue.

The U.S. Supreme Court granted certiorari.

ISSUE: Is there clearly established federal law providing guidance to a court in deciding whether to regulate non-disruptive courtroom behavior by spectators?

HOLDING: No

DISCUSSION: The Court discussed several cases that "addressed the effect of courtroom practices on defendants' fair-trial rights." In Estelle v. Williams, the Court held that it was improper to force a defendant to stand trial in "identifiable prison clothes."²⁷⁷ In Holbrook v. Flynn, the Court found that having "four uniformed state troopers" sit directly behind the defendant "was not so inherently prejudicial that it denied the defendant a fair trial."²⁷⁸

The Court noted, however, that prior cases had "dealt with government-sponsored practices," not the conduct of private actors. And, it noted "although the Court [had] articulated the test for inherent prejudice that applies to state conduct, ... [it had] never applied that test to spectators' conduct."

²⁷⁷ 425 U.S. 501 (1976)

²⁷⁸ 475 U.S. 560 (1986)

The Court concluded that since the U.S. Supreme Court had issued no rulings on the propriety of using that state test for private conduct, and because the U.S. Circuit Courts of Appeal had “diverged widely in their treatment of defendants’ spectator-conduct claims,” the Court concluded that there was, in fact, no clearly established federal law on the issue. As such, it could not say that the California state courts “unreasonably applied” federal law, since no previous decision “required that the California Court of Appeals to apply the test of Williams and Flynn to the spectators’ conduct here.” As such, the U.S. Supreme Court held that the “state court’s decision was not contrary to or an unreasonable application of clearly established federal law” and vacated the Ninth Circuit’s decision.

Full Text:

<http://www.supremecourtus.gov/opinions/06pdf/05-785.pdf>

***NOTE:** There appears to be no relevant Kentucky or Sixth Circuit Court of Appeals decisions on this type of issue to provide guidance to Kentucky courts, should a similar situation arise in Kentucky. This case is summarized because deputy sheriffs will be called upon by the court to assist in enforcing the court’s decision in such matters.*

Wallace v. Kato
127 S.Ct. 1091 (2007)

FACTS: As a result of a murder committed in Chicago in 1994, Wallace, age 15, was arrested. He was interrogated at length, and eventually confessed to the murder. He then, apparently, waived his Miranda rights and signed a statement to that effect.

Before the trial, Wallace’s counsel attempted to have the statement suppressed, unsuccessfully. He was convicted of murder. On appeal, however, the Illinois courts reversed the conviction, finding that he had been arrested without probable cause. The case was remanded for further proceedings, and eventually, the case against Wallace was dismissed.

Just less than a year after the case was formally dismissed, on April 2, 2003, Wallace filed an action for false arrest under 42 U.S.C. §1983. The defendant officers sought to have the case dismissed, arguing that the statute of limitations had run on such an action. The U.S. District Court agreed, and dismissed the case against the officers. The Seventh Circuit Court of Appeals affirmed that decision, holding that Wallace’s “cause of action accrued at the time of his arrest, and not when his conviction was later set aside.”

Wallace appealed, and the U.S. Supreme Court granted certiorari.

ISSUE: Does the statute of limitations on a false arrest claim, filed under 42 U.S.C. §1983, begin to run when the detention (arrest) actually occurs?

HOLDING: Yes

DISCUSSION: The Court began its discussion by noting that although the cause of action in the case is federal, that the statute of limitation in a §1983 case is that which is set by the state in which the incident occurs – it is the statute of limitation set for personal-injury tort actions. In Illinois, that would be two

years.²⁷⁹ Under the principles of Heck v. Humphrey²⁸⁰ and Carey v. Piphus,²⁸¹ the case accrues “when the plaintiff has a ‘complete and present cause of action.’” Certainly, Wallace could have filed suit immediately upon his arrest.

However, the Court noted, false imprisonment/arrest cases are the subject of “distinctive treatment” by the common law. In such cases, the courts have held that “[l]imitations begin to run against an action for false imprisonment when the alleged false imprisonment ends.”

Wallace argued that the appropriate statute of limitations began to run when he was actually released from custody. He further argued that under Heck v. Humphrey, “his suit could not accrue until the State dropped its charges against him.” “In Heck, a state prisoner filed suit under §1983 raising claims which, if true, would have established the invalidity of his outstanding conviction.” In effect, Heck “delays what would otherwise be the accrual date of a tort action until the setting aside of *an extant conviction* which success in that tort action would impugn.” The Court noted that what Wallace was seeking was “the adoption of a principle that goes well beyond Heck: that an action which would impugn *an anticipated future conviction* cannot be brought until the conviction occurs and is set aside.” That rule, the Court found, would be impractical. The court noted that if a plaintiff files a “false arrest claim before he has been convicted,” that the trial court will simply “stay the civil action until the criminal case or the likelihood of a criminal case is ended.” If the plaintiff escapes conviction, or if the conviction is set aside, the lawsuit will continue, otherwise, Heck would require dismissal of the lawsuit.

The Court, however, noted that §1983 cases have a complication that it must address. Many such cases “accrue before the setting aside of – indeed, even before the existence of – the related criminal conviction.” In the case at bar, for example, Wallace’s conviction would have served to toll (or stop) the running of the statute of limitations, and that toll would have only been lifted when that conviction was set aside. In that instance, his filing would have been timely.

The Court concluded that “the statute of limitations upon a §1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process.” In Wallace’s case, that time had run prior to the filing of the lawsuit, and thus, was “out of time.” The Seventh Circuit’s decision was affirmed.

Full Text:

<http://www.supremecourtus.gov/opinions/06pdf/05-1240.pdf>

Whorton v. Bockting

127 S.Ct. 1173 (2007)

FACTS: In the underlying criminal case, Bockting was convicted of multiple counts of sexual assault of his six-year-old stepdaughter. During that trial, it was determined that the child was “too distressed to be sworn in” and under Nevada state evidence law, the Court permitted the investigating detective to testify as to what the child had related about the assaults. (Her mother was also permitted to testify about the child’s statements.)

²⁷⁹ In Kentucky, it is one year.

²⁸⁰ 512 U.S. 477 (1994).

²⁸¹ 435 U.S. 247 (1978).

Bockting appealed his conviction through the state courts, which handed down its final decision, affirming his convictions, in 1993. The Court based its decision on Ohio v. Roberts, “which was then the governing precedent of” the Ninth Circuit.²⁸²

Bockting then pursued appeals through the federal courts, and the U.S. District Court affirmed his conviction. He then appealed to the Ninth Circuit Court of Appeals. While that appeal was pending, the U.S. Supreme Court issued Crawford v. Washington, in which it stated that the “interpretation of the Confrontation Clause set out in Roberts was unsound in several respects.”²⁸³

Bockting then argued that “if the rule in Crawford had been applied to his case, [the child’s] out-of-court statements could not have been admitted into evidence and the jury would not have convicted him.” The Ninth Circuit agreed and reversed the U.S. District Court, “holding that Crawford applies retroactively to cases on collateral review,” that “Crawford announced a new rule of criminal procedure” and that the rule was a “watershed rule that ‘rework[ed] our understanding of bedrock criminal procedure.’”

The Nevada Department of Corrections, which is a party to the case (rather than the prosecuting entity) because Bockting’s case was brought under the writ of habeas corpus against the party holding the defendant prisoner, appealed to the U.S. Supreme Court, which granted certiorari.

ISSUE: May an appeal be based upon Crawford v. Washington during the collateral appeal of the criminal case?

HOLDING: No

DISCUSSION: The Court noted that the Ninth Circuit’s decision, that Crawford is to be applied “retroactive to cases on collateral review” is in conflict with “every other Court of Appeals and State Supreme Court that [had] addressed [the] issue.”

The Court stated that there is a difference between a case that is considered to state an “old rule” and one that creates a new rule. Under Teague, a case that reinforces that an existing (or old) rule is to be applied on both direct and collateral review.²⁸⁴ (A direct review, for example, would be within the same court system, such as through the Kentucky courts, and which deals with the primary issue in the case. A collateral review would be an appeal of a state case through the federal system – as this case was – on an issue that isn’t primary to the substantive, factual case.) However, a “new rule is generally applicable only to cases that are still on direct review.”²⁸⁵ Further, the Court stated that “[a] new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a ‘watershed rul[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.”

Bockting’s conviction “became final on direct appeal well before Crawford was decided.” As such, the Court only had to decide “whether Crawford applied an old rule or announced a new one.” The Crawford decision was not “‘dictated’ by prior precedent” but was in fact, “flatly inconsistent with the prior governing

²⁸² 448 U.S. 56 (1980).

²⁸³ 541 U.S. 36 (2004).

²⁸⁴ Teague v. Lane, 489 U.S. 288 (1989).

²⁸⁵ Griffith v. Kentucky, 479 U.S. 314 (1987).

precedent” – the Roberts case. The Court found that a “reasonable jurist” ... “could have reached the conclusion that the Roberts rule was the rule that governed the admission of hearsay statements made by an unavailable declarant.” As such, the Court held that Crawford created a new rule.

Since it was a new rule, the Court moved to the second prong of the case, whether the Crawford case was so fundamental that it could be considered a “watershed” case. The Court noted that “in the years since Teague” - the case that created the criteria for such cases – the Court had “rejected every claim that a new rule satisfied the requirements for watershed status.” Such a case would have to meet two requirements: it “must be necessary to prevent an ‘impermissibly large risk’ of an inaccurate conviction” and it must “alter [the Court’s] understanding of the bedrock procedural elements essential to the fairness of a proceeding.”

Applying these criteria to Crawford, the Court agreed that the substance of the decision did not alleviate an “impermissibly large risk of an inaccurate conviction.” It found that the “Crawford rule is much more limited in scope, and the relationship of that rule to the accuracy of the factfinding process is far less direct and profound.” The Crawford Court had reached its decision as a way to “improve the accuracy of fact finding in criminal trials” but there has been simply no proof whether Crawford “on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials.” It did not find that Crawford effected a change of sufficient magnitude so as to make it retroactive.

This case did not meet the second criteria either, as it did not meet the “primacy” and “centrality” of the rule under Gideon v. Wainwright.²⁸⁶ The Supreme Court reversed the Ninth Circuit’s decision, overturned Bockling’s conviction and held that Crawford may not be raised in a case on collateral review.

Full Text:

<http://www.supremecourtus.gov/opinions/06pdf/05-595.pdf>

Scott v. Harris

127 S.Ct. 1769 (2007)

FACTS: In late March, 2001, a deputy sheriff in Coweta County, Georgia, “clocked [Harris’s] vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit.” The deputy activated his emergency equipment and tried to pull the vehicle over, but instead, it “sped away, initiating a chase down what is in most portions was a two-lane road, at speeds exceeding 85 miles per hour.” Deputy Scott and others joined in the chase. At one point, the responding officers tried to box in the Harris vehicle, and Harris “evaded the trap by making a sharp turn, colliding with Scott’s police car” and he escaped.

Scott then took over as the lead vehicle²⁸⁷ and six minutes, and ten miles, into the chase, Scott made an “attempt to terminate the episode by employing a “Precision Intervention Technique (‘PIT’) maneuver, which cause[d] the fleeing vehicle to spin to a stop.” Scott was instructed by his supervisor to “[g]o ahead and take him out.” Scott then “applied his push bumper to the rear of [Harris’s] vehicle” and Harris “lost control of [the] vehicle, which left the roadway, ran down an embankment, overturned, and crashed.” Harris became a quadriplegic as a result of the wreck.

²⁸⁶ 332 U.S. 375 (1963).

²⁸⁷ From the video, it appears that the officers already anticipated they would need to make contact with the vehicle to stop it, since Scott stated that he should take the lead as his vehicle was already damaged from the earlier collision.

Harris filed suit under 42 U.S.C. §1983, arguing that his injuries were as a result of an excessive use of force by Deputy Scott. Scott filed for summary judgment, but the U.S. District Court in the Northern District of Georgia denied the motion, finding that there were “material issues of fact” which prevented the Court’s grant of the motion. The Eleventh Circuit Court of Appeals affirmed that decision, finding that Scott’s action could constitute “deadly force” and that a reasonable jury might find that his use of force was not appropriate.

Scott requested, and was granted, certiorari from the U.S. Supreme Court.

ISSUE: Is a law enforcement officer’s conduct “objectively reasonable” under the Fourth Amendment when the officer makes a split-second decision to terminate a high-speed pursuit by bumping the fleeing suspect’s vehicle with his push bumper, because the suspect had demonstrated that he would continue to drive in a reckless and dangerous manner that put the lives of innocent persons at serious risk of death?

HOLDING: Yes

DISCUSSION: In Saucier v. Katz, the Court noted that the “threshold question” for an analysis of qualified immunity is “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?”²⁸⁸ Only if the Court finds such a violation will the Court take the next step to determine if “the right was clearly established” at the time, and “in light of the specific context of the case.”

The Court noted that Harris’s “version of events (unsurprisingly) differs substantially from Scott’s version.” Usually, that requires the Court to accept the plaintiff’s version in all matters in dispute. “There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question.” As Harris did not argue that the “videotape was doctored or altered in any way,” the Court accepted the tape as valid. The Court noted that the “videotape quite clearly contradicts the version of the story told by [Harris] and adopted by the Court of Appeals.”

As an example, Harris asserted that “during the chase, ‘there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [Harris] remained in control of his vehicle.’” The Court stated that “[i]ndeed, reading the lower court’s opinion, one gets the impression that [Harris], rather than fleeing from police, was attempting to pass his driving test.”

The Court noted, however, that “[t]he videotape tells quite a different story.” The Court continued, stating:

There we see [Harris’s] vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car

²⁸⁸ 533 U.S. 194 (2001).

chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

The Court stated that Harris's "version of events is so utterly discredited by the record that no reasonable jury could have believed him" and that the "Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."

The Court found it "quite clear that Deputy Scott did not violate the Fourth Amendment." Deputy Scott admitted that his decision to terminate the pursuit by ramming Harris's car was a seizure. As such, the only question for the Court was whether that decision, and the action, was "objectively reasonable" under the circumstances.

The Court rejected Harris's argument that the actions must be considered deadly force, thus requiring the application of Tennessee v. Garner.²⁸⁹ The Court stated that "Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" The appropriate factors from Garner "have scant applicability to this case, which has vastly different facts." In particular, the "threat posed by the flight on foot of an unarmed suspect [is not] even remotely comparable to the extreme danger to human life posed by [Harris] in this case." In the end, the Court stated, "all that matters is whether Scott's actions were reasonable."

Scott defend[ed] his actions by "pointing to the paramount governmental interest in ensuring public safety, and [Harris] nowhere suggests this was not the purpose motivating Scott's behavior." To decide upon reasonableness, the Court "must consider the risk of bodily harm that Scott's actions posed to [Harris] in light of the threat to the public that Scott was trying to eliminate." The Court found it "clear from the videotape that [Harris] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." The Court found it "equally clear that Scott's actions posed a high likelihood of serious physical injury or death to [Harris] – though not the near *certainty* of death posed by" a shooting such as occurred in Garner. It was Harris, "after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted." The Court continued:

Multiple police cars, with blue lights flashing and sirens blaring, had been chasing [Harris] for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did."

But wait, says [Harris]: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas Scott's action-ramming [Harris] off the road – was *certain* to eliminate the risk that [Harris] posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to [Harris] that the chase was off, and that he was free to go. Had [Harris] looked in his rear-view mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or

²⁸⁹ 471 U.S. 1 (1985)

simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Given such uncertainty, [Harris] might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.

The Court was "loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger." Further:

It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

The U.S. Supreme Court found that Deputy Scott was entitled to summary judgment and the decision of the U.S. Court of Appeals, Eleventh Circuit was reversed.

Full text:

<http://www.supremecourtus.gov/opinions/06pdf/05-1631.pdf>

Video (in Real Player):

http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb

Note: This case clearly addresses the value of an audiovisual recording during a chase or other law enforcement encounter, particularly when, as in this situation, the officers involved conducted themselves in a calm and professional manner.

Los Angeles (CA) County v. Rettele
127 S.Ct. 1989 (2007)

FACTS: "From September to December, 2001, Los Angeles County Sheriff's Department Deputy Dennis Watters investigated a fraud and identity theft crime ring." He had four suspects, all African American, and one who had a handgun registered in his name.

On Dec. 11, Deputy Watters got search warrants for two houses where he believed the suspects might be found. The warrant authorized searching the homes and three of the suspects for "documents and computer files." Deputy Watters had used several sources, including Department of Motor Vehicle files, mailing address listings, an outstanding warrant for one of the suspects and an Internet telephone directory to place the suspects as living at Rettele's home.

However, what the deputy "did not know was that one of the houses (the first to be searched) had been sold in September to Max Rettele." Rettele shared the house with his girlfriend, Sadler, and her 17-year old son, Chase Hall. All three of these individuals were Caucasian.

On December 19, the deputies involved in the search were briefed by Watters about the three suspects and about the weapon. Because they had not gotten permission for a nighttime search (a requirement under state law), the warrant could not be executed under after 7 a.m. At about 7:15 a.m. the deputies knocked on the door and Chase Hall answered. "The deputies entered the house after ordering Hall to lie face down on the ground." Their entry woke Rettele and Sadler. The deputies entered their bedroom and ordered them to get out of bed, but both protested that "they were not wearing clothes." Rettele attempted, but was not permitted to, put on sweatpants, and Sadler was likewise not permitted to "cover herself with a sheet." They were held at gunpoint, although at some point "Rettele was permitted to retrieve a robe for Sadler" and he was allowed to dress. Within a few minutes, they were permitted to sit on the couch in the living room.

After a few more minutes, the "deputies realized they had made a mistake," apologized, "thanked them for not becoming upset," and left. They found the three suspects at the other house and arrested all three.

Rettele, Sadler and Hall (through Sadler) filed suit under 42 U.S.C. §1983 against Los Angeles County, the Sheriff's Office, Deputy Watters and others, alleging that their Fourth Amendment rights were violated by the deputies "obtaining a warrant in [a] reckless fashion and conducting an unreasonable search and detention."

The U.S. District Court found that the "warrant was obtained by proper procedures and the search was reasonable" and in the alternative, that the rights allegedly violated were not clearly established and that, as a result, the deputies were entitled to qualified immunity." Upon further appeal, Rettele did not challenge that the warrant itself was valid, but "did argue that the deputies had conducted the search in an unreasonable manner." The Ninth Circuit reversed the lower court's opinion, holding that facts of the case indicated an unreasonable search, and that the deputies "should have known the search and detention were unlawful."

The County (and the individual defendants) appealed, and the U.S. Supreme Court accepted certiorari.

ISSUE: Does the discovery that occupants of a home subject to a search warrant are of a different race than those of the suspects require that the law enforcement officer immediately stop the search and not take action to temporarily secure those occupants?

HOLDING: No

DISCUSSION: The Court first addressed the Ninth Circuit's assertion that "[b]ecause [Rettele and the others] were of a different race than the suspects the deputies were seeking" that the deputies should have immediately recognized that they were not the suspects and that they "did not pose a threat to the deputies' safety." The Court found that to be an "unsound proposition" as the deputies would have "had no way of knowing whether the African-American suspects were elsewhere in the house."

The Court looked to Michigan v. Summers²⁹⁰ and agreed that it was reasonable to secure occupants during the execution of a search warrant. The Court found that "[u]nreasonable actions include the use of

²⁹⁰ 452 U.S. 692 (1981).

excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time.”²⁹¹

The Court found that the “orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies.” In addition, the Court noted that the “Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach.” In this case, the “deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger.” They were not “required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with sheets.”

The Court did not give the deputies freedom to force the two “to remain motionless and standing for any longer than necessary.” However, in this case, the “deputies left the home less than 15 minutes after arriving.” There was no assertion “that the deputies prevented Sadler and Rettele from dressing longer than necessary to protect their safety.” In fact, Sadler agreed that “once the police were satisfied that no immediate threat was presented,” the couple were encouraged to get dressed.

The Court concluded that the “Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty.” Further, it noted:

Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity: and the resulting frustration, embarrassment, and humiliation may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

The decision of the Ninth Circuit was reversed, and the case remanded for further proceedings consistent with this opinion.

FULL TEXT:

<http://www.supremecourtus.gov/opinions/06pdf/06-605.pdf>

Brendlin v. California

127 S.Ct. 2400 (2007)

FACTS: On Nov. 27, 2001, Deputy Sheriff Brokenbrough, along with her partner, made a stop of a vehicle displaying a temporary tag. The tag indicated that it was valid through November, but the deputies “decided to pull the Buick over to verify that the permit matched the vehicle, even though, as Brokenbrough admitted later, there was nothing unusual about the permit or the way it was affixed.” Brokenbrough asked the driver, Simeroth, for her license. One of the deputies recognized the passenger, Bruce Brendlin, as “one of the Brendlin brothers” and asked the passenger to identify himself, as Brokenbrough knew that one of the two brothers had “dropped out of parole supervision.”

Upon obtaining the passenger’s identification, the deputy returned to the cruiser and verified that there was an outstanding warrant for that individual. While they were waiting for back-up, the deputy “saw Brendlin

²⁹¹ Graham v. Connor, 490 U.S. 386 (1989); Muehler v. Mena, 544 U.S. 93 (2005)

briefly open and then close the passenger door of the Buick.” Once the deputies were able to remove Brendlin from the car and place him under arrest, they searched his person and found an “orange syringe cap.” Simeroth was patted down and the deputies found “syringes and a plastic bag of a green leafy substance.” She was also arrested. A search of the vehicle revealed “tubing, a scale, and other things used to produce methamphetamine.”

Brendlin was charged with possession and manufacture of methamphetamine, because of the items found in the car, and he moved for suppression of that evidence. Brendlin argued that “the officers lacked probable cause or reasonable suspicion to make the traffic stop.” He did not argue that his rights were violated by the stop, but “claimed only that the traffic stop was an unlawful seizure of his person.” The California “trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until Brokenbrough ordered him out of the car and formally arrested him.” Brendlin took a conditional guilty plea, and appealed.

The state appellate court reversed the trial court, finding that the traffic stop was, in fact, unlawful. The prosecution conceded that the “police officers lacked reasonable suspicion to justify the traffic stop because” the display of the temporary permit was legal. The California Supreme Court, however, reversed, finding that the legality of the original stop was immaterial, and that “a passenger is not seized as a constitutional matter absent additional circumstances that would indicate to a reasonable person that he [the passenger, specifically] was the subject of the officer’s investigation or show of authority.”

Brendlin requested certiorari, and the U.S. Supreme Court accepted the case.

ISSUE: Is a passenger in a vehicle subject to a traffic stop “detained” for purposes of the Fourth Amendment?

HOLDING: Yes

DISCUSSION: The Court began its unanimous decision by stated that a “person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer, ‘ by means of physical force or show of authority,’ terminates or restrains his freedom of movement.”²⁹² A seizure may be made by a simple “show of authority” without physical force, but there is “no seizure without ... [an] actual submission.”

The Court noted that it had previously created a “test for telling when a seizure occurs in response to authority, and when it does not.” In U.S. v. Mendenhall, the Court ruled that “a seizure occurs if ‘in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’”²⁹³

The Court noted that the “law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver ‘even though the purposes of the stop is limited and the resulting detention quite brief.’”²⁹⁴ Further, the Court stated that while it had not yet “squarely answered the question whether a passenger is

²⁹² Florida v. Bostick, 501 U.S. 429 (1991); Brower v. County of Inyo, 489 U.S. 593 (1989).

²⁹³ 446 U.S. 544 (1980).

²⁹⁴ Delaware v. Prouse, 440 U.S. 648 (1979). Whren v. U.S. , 517 U.S.806 (1996).

also seized," it had stated, "in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver."

To resolve the question in this case, the Court asked "whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." The Court continued, stating that it thought "that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." Further:

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on 'privacy and personal security' does not normally (and did not here) distinguish between passenger and driver."²⁹⁵ An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.

The Court also agreed that it is "reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."²⁹⁶ The Court agreed that the "risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."

Finally, the Court noted that its decision "comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question" - leading to a "prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop."

The Court disagreed with the premises of the California Supreme Court. Using the objective test described in Mendenhall "of what a reasonable passenger would understand," the Court noted that "[t]o the extent that there is anything ambiguous in the show of force was it fairly seen as directed only at the driver or at the car and its occupants, the test resolves the ambiguity, and here it leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority." The Court also found that "what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." In other words, "Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside."

²⁹⁵ U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976).

²⁹⁶ Maryland v. Wilson, 519 U.S. 408 (1997); Pennsylvania v. Mimms, 434 U.S. 106 (1977); Michigan v. Summers, 452 U.S. 692 (1981)

The Court concluded its opinion by noting that holding otherwise would lead to the situation where “[h]olding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.” Further:

The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of ‘roving patrols’ that would still violate the driver’s Fourth Amendment right.

The Court concluded that “Brendlin was seized from the moment Simeroth’s car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest.” The Court vacated the decision of the California Supreme Court and remanded the case back to California for further proceedings consistent with the opinion.

FULL TEXT:

<http://www.supremecourtus.gov/opinions/06pdf/06-8120.pdf>

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